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BY

F. M. GOADBY, Esq., D.C.L.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ᾽ ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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CONTENTS OF VOL. XVII.

PAGE

THE ADMINISTRATION OF JUSTICE IN EAST AFRICA 1
Contributed by SIR ALISON RUSSELL.

THE CONSTITUTIONAL CAPACITY OF CANADA TO GIVE EFFECT TO INTERNATIONAL LABOUR CONVENTIONS, II 12
Contributed by C. WILFRED JENKS, ESQ.

BROADCASTING AND COMPARATIVE LAW 31
Contributed by B. A. WORTLEY, ESQ., LL.M.

BYNKERSHOEK'S OBSERVATIONES TUMULTUARIAE 38
Contributed by PROFESSOR R. W. LEE, D.C.L.

THE LAW RELATING TO DEVALUATION OF CURRENCY 47
Contributed by DR. JUR. RUDOLF GOTTSCHALK.

MEASURE OF DAMAGES IN THE FRENCH LAW OF CONTRACT . . 61
Contributed by PROFESSOR RENÉ DAVID.

NEW REGULATIONS IN THE GERMAN CODE OF CIVIL PROCEDURE . 73
Contributed by DR. ERNST J. COHN.

MENS REA IN GERMAN AND ENGLISH CRIMINAL LAW, I. . . . 82
Contributed by PROFESSOR HERMANN MANNHEIM.

SALVAGE AND COLLISIONS OF AIRCRAFT—DRAFT CONVENTIONS . 102

NOTES ON IMPERIAL CONSTITUTIONAL LAW 109
Contributed by PROFESSOR BERRIEDALE KEITH, D.C.L.

WILLIAM HARRISON MOORE: BIOGRAPHICAL NOTE 161

THE FEDERATIONS AND SUITS BETWEEN GOVERNMENTS . . . 163
Contributed by the late SIR W. HARRISON MOORE, K.B.E., C.M.G.

ADMINISTRATIVE AUTHORITIES AND THE COURTS 210
Contributed by W. IVOR JENNINGS, ESQ.

INDIAN AND FAR EASTERN CASES ON THE CONFLICT OF LAW, 1934 220
Contributed by S. VESEY FITZGERALD, ESQ., LL.D.

THE "ACCIDENT" IN CONTINENTAL INSURANCE LAW . . . 227
Contributed by DR. JUR. E. STIEFEL.

MENS REA IN GERMAN AND ENGLISH LAW, II 236
Contributed by PROFESSOR HERMANN MANNHEIM.

PAGE

JUDICIAL PRECEDENT IN THE MAKING OF INTERNATIONAL PUBLIC LAW 251
Contributed by JOHN C. GARDNER, ESQ., B.L., PhD.

THE TACTIC OF PROGRESS IN INTERNATIONAL GOVERNMENT. . 260
Contributed by PITMAN B. POTTER, ESQ.

THE INTERNATIONAL COMMUNITY 265
Contributed by ØYSTEIN HEGGSTAD, ESQ.

NOTES ON IMPERIAL CONSTITUTIONAL LAW 269
Contributed by PROFESSOR BERRIEDALE KEITH, D.C.L.

NOTES:

Law and History. W. S. Holdsworth 123
The Law Quarterly Review. F. M. G. 124
The Constitution of the U.S. of Brazil, of July 10, 1934. Marcus Wyler 124
Palestine Law Reports. S. V. FG. 127
Bankruptcy of Non-Traders 127
A Survey of the Law of the Empire 128
International Legislation 128
The Penal Code of the Russian Socialist Federal Soviet Republic. Hermann Mannheim 129
Annales de l'Institut de Droit comparé de l'Université de Paris. F. M. G. 130
Anales de la Facultad di Ciencias Juridicas y Sociales de la Universidad de la Plata. Wyndham A. Bewes . . 131
Zeitschrift für ausländisches öffentliches Recht und Völkerrecht. F. P. W. 132
The late Mr. Justice O. W. Holmes 281
R. v. *Woolmington* 281
Rights of a Third Party under a Contract in French Law. E. J. Cohn 282
The Orthodox Patriarchate of Jerusalem 284
Probation in the Courts. N. Adler 286
Delegated Legislation in Northern Ireland . . . 288
Current Events 289
American Journal of International Law. H. A. S. . . 290

NOTICES OF BOOKS:

PAGE

Borchard, Edwin, *Declaratory Judgments*. M. S. Amos . 133

Melbourne, A. C. V., *Early Constitutional Development in Australia: New South Wales*, 1788–1856. A. Berriedale Keith 134

Jennings, W. Ivor, *Parliamentary Reform*. Edward Jenks. 135

Barthélemy, Joseph, *Essai sur le Travail Parlementaire et le Système des Commissions*. C. T. Carr 138

Kennedy, W. P. M., *Essays in Constitutional Law*. A. Berriedale Keith 139

Demogue, Jean, *Le Crédit Documentaire en Droit Anglais*. R. S. T. C. 140

White, Leonard D., *Trends in Public Administration*. C. E. A. B. 142

Williams, Sir John Fischer, *Some Aspects of the Covenant of the League of Nations*. F. N. Keen 144

Berdahl, Clarence A., *The Policy of the United States with Respect to the League of Nations*. S. H. Bailey . . 147

Molony, W. O'Sullivan, *Nationality and the Peace Treaties*. F. N. Keen 147

Karve, D. G., *Federations: A Study in Comparative Politics*. A. Berriedale Keith 149

Bethlen, Count Stephen, *The Treaty of Trianon and European Peace*. N. B. 149

Arnold, Ralph, *Treaty-making Procedure*. S. H. Bailey . 150

Olagnier, Paul, *Le Droit d'Auteur*. René David . . 150

Mackintosh, James, *Roman Law in Modern Practice*. R. W. Lee 151

Weber, Prof. Dr. H. von, *Internationale Strafgerichtsbarkeit*. Hermann Mannheim 152

Steed, H. Wickham, *A Way to Social Peace*. F. M. G. . 153

Hodson, Cora, B.S., *Human Sterilization To-day*. C. E. A. B. 154

Guettys, Luella, *The Law of Citizenship in the United States*. F. A. Vallet 155

Boor, Hans Otto de, *Die Methode des englischen Rechts und die deutsche Rechtsreform*. F. M. G. 156

Yan-chun, Chan, *La Législation par Ricochet dans le Droit Constitutional Américain*. C. T. Carr 158

Kennedy, W. P. M., and Schlosberg, H. F., *The Law and Custom of the South African Constitution*. Hoops, Otto W. A., *Der Status der Südafrikanischen Union*. Apelt, F., *Das Britische Reich als völkerrechtsverbundene Staatengemeinschaft*. Pakenham, Frank, *Peace by Ordeal*. A. Berriedale Keith 291

Notices of Books (*continued*): PAGE

Palmer, G. E. H., *Consultation and Co-operation in the British Commonwealth.* R. T. E. Latham 292

Fawcett, Charles, *The First Century of British Justice in India.* B. L. 294

Drewitt, F. Dawson, *Bombay in the Days of George IV: Memoirs of Sir Edward West.* F. M. G. 299

Lévy-Ullmann, Henri, *The English Legal Tradition: Its Sources and History.* Trans. by M. Mitchell and F. M. Goadby. Edward Jenks 300

Vaughan, J. H., *The Dual Jurisdiction in Zanzibar.* F. M. G. 303

Goadby, F. M., and Doukhan, Moses, *The Land Law of Palestine.* W. H. Hill 305

Corwin, Edward S., *The Twilight of the Supreme Court: A History of our Constitutional Theory.* E. Jenks. . 307

Field, Oliver D., *The Effect of an Unconstitutional Statute.* E. C. S. W. 309

Bassett, E. M., Williams, F. B., Bettman, A., and Whitten, R., *Model Laws for Planning Cities, Counties and States.* R. C. Maxwell 310

Hogbin, H. Ian, *Law and Order in Polynesia.* John Layard 312

Cairns, Huntingdon, *Law and the Social Sciences.* B. E. K. 314

Amos, Sir Maurice Sheldon, and Walton, F. P., *Introduction to French Law.* Henri Lévy-Ullmann . . . 315

Aghion, R., *French Law as applied to British Subjects and Companies.* R. D. 318

Hudson, Manley O., *The Permanent Court of International Justice.* H. L. 319

World Court Reports. Vols. I and II, edited by Manley O. Hudson. J. C. G. 321

Hedges, R. Yorke, *International Organization.* Alfred Zimmern 323

Pufendorf's De Jure Naturae et Gentium Libri Octo (No. 17 Classics of International Law). R. W. L. . . . 323

Christian Wolff's Jus Gentium Methodo Scientifica Pertractatum (Classics of International Law). N. B. . . 325

Ricca-Barberis, Mario, *Istituzioni di Diritto Privato esposte per tavole sinottiche.* S. V. FG. 326

THE ADMINISTRATION OF JUSTICE IN EAST AFRICA.

[*Contributed by* SIR ALISON RUSSELL.]

THE Report of the Commission appointed by the Secretary of State for the Colonies to investigate and report on the administration of justice (other than in Native courts) in Kenya, Uganda and the Tanganyika Territory is a state document of great interest and importance. The Commission consisted of Mr. H. G. Bushe, C.B., C.M.G., the Legal Adviser to the Secretaries of State for Dominion Affairs and for the Colonies, as chairman ; Mr. A. D. A. MacGregor, K.C., the Attorney-General of Kenya ; Mr. McLellan Wilson, O.B.E., who has had a lifetime experience in East Africa ; Mr. P. E. Mitchell, C.M.G.,M.C., the Secretary for Native Affairs, Tanganyika Territory ; and Mr. Justice C. E. Law, Puisne Judge, Uganda. The Report may, therefore, be considered as representing opinion generally in East Africa. It is unanimous, save that one member, Mr. Justice Law, makes a note of reservation with regard to the admission of confessions made to certain European police officers. He considers that the law which provides that no confession made to a police officer shall be proved as against a person accused of any offence should remain unchanged. Mr. Justice Law's opinion is shared by the majority of the judges in East Africa. The writer shares in that opinion and agrees with the Chief Justice of Kenya when he says :

> Although many European police officers might conscientiously investigate the reasons which induced the accused person to confess, it is too much to expect of human nature that every European police officer would inquire too deeply into such reasons (p. 110).

Apart from that question, the writer ventures to express his agreement with this admirable Report and with the comment made in the letter of the Chief Secretary to the Tanganyika Government that " matters on which the Commission has made recommendations should now be regarded as *res judicatae* " (p. 145).

Executive Authority and the Judiciary.—In the appendix to this Report, however, there are contained despatches from Mr. H. M.-M.

Moore, Acting Governor of Kenya; from Sir B. H. Bourdillon, K.C.M.G., K.B.E., Governor of Uganda; and from Sir Harold MacMichael, K.C.M.G., D.S.O., Governor of the Tanganyika Territory. These despatches are far from agreeing with the Report, and the Report and the despatches must be studied together. The age-long debate between the executive authority and the judiciary emerges. In the East African possessions, subject to the general control of the Secretary of State, the executive authority is the Governor. Rarely does an official differ from the Governor; more rarely does he ask that his opinion may be referred to the Secretary of State; more rarely still is his opinion upheld by the Secretary of State. In Executive Council, the Governor follows his own opinion. In Legislative Council, the official majority vote as the Governor instructs them. The judiciary are not able to share in this universal assent: they serve another master, the law. Executive authorities are apt to regard with disfavour the restraints imposed on them or which may be imposed on them by the judiciary administering the law, and to take the view that, though the civilization of their territories is rapidly increasing, the jurisdiction and authority of the judges should not be increased, but, indeed, if possible, should be diminished.

An article of this kind cannot deal in detail with the despatches contained in the appendix to the Report. The writer confesses that occasionally he has been perplexed by statements in the despatches which appear to him to be not entirely consistent. Further, it is not always clear whether statements are to be deemed to refer to the judges of the High Court or to the stipendiary magistrates, or to both the judges and the stipendiary magistrates. It would seem that the simplest course is to set out extracts which represent the general tendency of the despatches and to refer the reader to a study of the despatches at length for their contents.

The two opposing points of view are best stated by two extracts, one from the Report and one from the appendix. The Commission state their opinion as follows:

> We regard it as a fundamental necessity, from the point of view of law and order, that there should be a strong and adequate judiciary which the people of the country understand and respect. It is of equal importance that judicial work should be performed by persons with adequate experience who are trained in the weighing of evidence and the requirements of legal proof (p. 21).

The Governor of the Tanganyika Territory states the opposite opinion:

> If a fundamental change of the legal structure is now out of the question, and if more and more professional judges are, and will be, in consequence required for its administration, I would at least urge in the interests of the native population that such measures of alleviation as are still possible may be taken in the direction of simplification and decentralization by the method of entrusting more powers with fewer formalities to the local administrative authorities in the out-districts, and, if it is necessary, by increasing the training of the Administrative Officer in the art of clear thinking and the knowledge of the criminal law (p. 158).

It will be observed that what the Commission regards as a fundamental necessity, the Governor would desire fundamentally to change.

Sir Donald Cameron, G.C.M.G., K.B.E., in his address to the Legislative Council of Nigeria on March 6, 1933, in discussing a similar problem, said:

> The old argument will no doubt be used, too, that owing to his closer daily contact with them, the Administrative Officer must know more of the habits and mentality of the natives than a judicial officer can, and must therefore be better equipped to correct their faults. This issue seems to be a very closely defined one. If the judgment of the court is to be the judgment of an officer experienced in the art of sifting and weighing evidence and is to be based solely on the evidence which has been laid before him in the case, it does not matter a great deal to me what he is called. Administrative Officer or Magistrate, or what the court may be called; it is sufficient that the court is a judicial tribunal and the trial officer a judicial officer. But if the decision of the court may properly be swayed by political or other non-juridical considerations within the knowledge of the Administrative Officer and is therefore not to be based solely on the evidence which has been led, then in my judgment the court has ceased to be a judicial tribunal and the officer has ceased to be a judicial officer. Change the system of law, if you will, and punish the people by Administrative Officers exercising a kind of parental correction because the people are primitive; but remember always, pray, if you do so that you will thereby be depriving the natives of the protection of any judicial court and any judicial system of law. That has not in the past been the policy or the practice which has governed the acts of the Nigerian Government (pp. 20–1).

That is very well said and puts the whole matter in a nutshell. But, as Lord Macnaghten said of the rule in Shelley's Case, it is one thing to put it in a nutshell and another to keep it there.

There are two phrases which are inevitably brought into any discussion on the matter: (1) legal technicalities; (2) knowledge of "the native."

Legal Technicalities.—It is sometimes alleged that the judiciary delight in dealing with cases in which natives are concerned in a highly technical way, and that they take pleasure in quashing the decisions of administrative officers on purely legal technicalities. It is to be remarked, in the first place, that there is a provision of law in East Africa which lays down that every court shall decide all cases in which natives are concerned "according to substantial justice without undue regard to technicalities of procedure." The judiciary obey this provision of law as they obey any other provision of law. But a native is entitled to the protection of the law no less than any other British subject, and when there has been a substantial breach of the law a judge would fail in his duty if he treated it as a mere technicality. The attitude of the judiciary is fairly described in the following passage from a handbook for magistrates written by the writer:

> An opinion has occasionally been held that the High Court rather enjoys quashing or revising the decisions of magistrates. Such an opinion could only be held by a magistrate who had in view the cases coming from his particular district, and a short experience in the High Court offices would show him that it is entirely erroneous. All the cases from all the districts arriving at the High Court represent what may fairly be described as an avalanche of papers. . . . In order that a case may be quashed or varied, the revising judge must write a considered judgment. This judgment must be laboriously and accurately prepared, as magistrates have been known to return to the charge with success. And this is not nearly so easy as initialing and dating a file, and passing it as correct. In any case which is not obviously wrong, the Attorney-General is asked if he wishes to appear and support the conviction. Magistrates may therefore rely upon their decisions being supported when this can properly be done. It is certainly unpleasant to have one's judgment quashed or varied; an experience which the revising judge himself may undergo at the hands of the Court of Appeal. If a judgment is shown to be wrong in law, the magistrate must in future cases follow the law as laid down. If a judgment is held to be wrong on the facts, as this makes no difference in future cases, the magistrate may continue to consider that his finding on the facts was the right one.

It was with interest that the Report was searched for instances of legal technicalities. The following evidence was as near to it as the Commission could get:

> *Chairman :* Have you any case in mind where a conviction has been quashed on a pure triviality ?
>
> *Witness :* I think it has happened in some of the stock theft cases. I cannot quote at this moment, but I think some of the District Officers who have these cases before them day after day would be able to give you more information about them.
>
> *Chairman :* We have been looking at some returns, I don't know if you have seen them. I do not think anyone has yet suggested that any of these cases were interfered with on trivialities.
>
> *Witness :* No. If you wish for information on that point I could send the District Commissioner, Kisumu, who is intimately acquainted with this kind of work, to appear at Nakuru (p. 49).

In Kenya confirmation case No. 97 of 1933, Mr. Justice Thomas, in delivering judgment, expressed the following opinion, with which the Commission state that they are in complete agreement :

> In the appendix to Vol. I of the Kenya Law Reports appears the following : " The valuable provisions of Article 20 of the Order in Council of 1920 are not to be misconstrued into an authority for administering justice to the native in the rough and ready style of which some affect to think highly, but which is generally but the sign of lack of experience or of sympathy and patience and not infrequently results in what is in reality rough and ready injustice."
>
> These words meet with my entire approval and I repeat them here and give them even greater force, if possible, than they had in the early history of the Colony. This I deem necessary, for some would still seem to think that the language of the Order in Council is to be treated as a charter of liberty to allow any breach of regularity in the administration of justice and more especially to excuse errors in the proper conduct of trials on the part of authority (p. 54).

Finally, the Commission reported as follows :

> We have made a careful examination of the records of work done in confirmation and revision by all three High Courts and we are fully satisfied that the work is well done and the powers properly exercised. We have found no case in which a conviction has been quashed on what is only a technicality (p. 52).

It is supposed that it is too much to hope that the phrase " legal technicalities " will never again be heard of in this connexion.

Knowledge of the Native.—It appears to be alleged that the judiciary do not have any " knowledge of the native," and that an administrative officer acting as a magistrate necessarily has that knowledge. The first question is, who and what is " the native." " The natives " are sometimes spoken of as if they were the same throughout East Africa ; but in fact the different tribes are completely different. It is just as unwise to apply a knowledge of the natives of one part of East Africa to the natives of another part of East Africa as it would be to apply a knowledge of " the native " of Devonshire to " the native " of Lombardy. Indeed, more so: for the natives of Devonshire and Lombardy have, at least to some extent, the same sort of religion and the same sort of customs and culture: whereas the natives of different parts of East Africa have entirely different religions and customs, and no common culture whatever. The needs of the service require administrative officers to be stationed from time to time in different parts of the territory; it is rare for an officer to be appointed for more than a few years in the same district. As a rule they learn one language well, Swahili, the common language spoken by many of the natives throughout East Africa. Rarely do they learn another local language; at least, not so well as to be able to converse with freedom in it. On being transferred to another part of the territory, they will be confronted with another completely new language or new languages. It is submitted, therefore, that, as a rule, the most that an administrative officer can obtain is a general knowledge of African natives: a very useful knowledge indeed, but not sufficient to take the place of evidence in a court of justice. Moreover, it does not seem clear why this general knowledge cannot be acquired by a member of the judiciary who spends his time in administering justice to "the native."

This " knowledge of the native " is alleged to have a remarkable effect on the conduct of trials by administrative officers—sometimes apparently supplying the place of missing evidence. It was with interest that the Report was searched for instances when a " knowledge of the native " unmistakably altered the course of justice. The following instance is as near to it as the Report contains. Mr. A. de V. Wade writes:

> One instance alone may suffice in support of this contention. A native of Kisii was charged with theft from a Luo. The evidence against him was complete and flawless, but the accused protested that he was innocent. The magistrate (an Assistant District Commissioner), knowing that whenever a Kisii stole from a Luo he was so proud of the fact that he would always admit it, refused to convict for no other reason than the accused's protest, and adjourned the case for further investigation. It transpired that there had been a quarrel and that the complainant and all the witnesses had concocted an ingenious and perfect conspiracy. But for the magistrate's local knowledge an innocent man would undoubtedly have been convicted. Such instances can, of course, be multiplied indefinitely (pp. 115 and 116).

It is greatly to be hoped that this is not the case. If he is correctly reported, the young officer appears not merely to have committed a breach of the law, but to have been lacking in ordinary common sense. The law provides that the court shall examine the accused to see if he has any explanation to offer on the points in evidence against him, and common sense would seem to require that some attempt should be made to ascertain the relations between the accuser and the accused. Mr. Wade considers that this instance alone suffices to dispose of a highly debatable question ; but if, as he says, " such instances can, of course, be multiplied indefinitely," the writer, who has unsuccessfully looked for such instances during a quarter of a century of legal service, can only regret that he did not select two or even three instances of greater value. No other instance of this kind of " knowledge of the native " appears to have been brought to the notice of the Commission ; but it is supposed that it is too much to hope that this argument will not continue to be brought forward in this connexion.

A knowledge of the time the cows come home is of value (p. 19)—but it is submitted that of greater value is experience of the reactions of the native before the court, whether he is telling the truth or not, and whether he is intentionally obtuse or merely confused ; and surely the best means of gaining that experience must be the assiduous daily practice of a stipendiary magistrate in the court.

The Governor of Uganda writes :

> I venture, however, to call attention to the fact that I served for two and a half years as Registrar of an Indian High Court, and that I may therefore claim to have some experience of aspects of this exceedingly difficult question which do not ordinarily come within the purview of the administrative officer (p. 124).

The writer served for one and a half years as Chief Secretary to the Government of Uganda, and in virtue of this service he may be allowed to express his opinion on " the native " in relation to the administration of justice. It seems remarkable that people asserting a " knowledge of the native " should yet consider him to be a stupid sort of person, quite unable to understand the meaning of a trial before a judge of the High Court. A native is accustomed to different grades of headmen and chiefs, and he is accustomed to the administration of justice in his native courts and in the magistrates' courts. In any district which is sufficiently administered to allow of a visit of the High Court he has no difficulty whatever in understanding that he is accused of a serious crime and that a special kind of officer, in a red robe, of special knowledge, different from his administrative officers, is sent to the district to try him. In the writer's experience, the native is by no means a stupid or terrified person when his liberty or interests are concerned.

The Acting Governor of Kenya writes:

> I find myself in full agreement with the arguments elaborated in paragraphs 2 to 9 of Mr. Wade's Memorandum, and whatever criticisms may be passed on the present system of administering justice in criminal matters in Kenya, it is not, in my opinion, either logical or fair to base such criticisms on its failure to conform with a theory which in fact the Government had never endorsed. . . . Any experienced Administrator could quote cases both of convictions and of acquittals which, though legally unassailable in the eyes of the trained lawyer, have amounted in natives' eyes to a miscarriage of substantial justice . . . (p. 105).
>
> . . . financial considerations apart, I should welcome the appointment of an additional Judge . . . (p. 106).
>
> I have no personal knowledge of the magisterial work of Administrative officers . . . (p. 106).

Mr. Wade writes:

> Under such conditions as these it may well be that the man best qualified to determine the facts in a native criminal case is not necessarily the expert in law, but one who, from having lived and worked among natives, has some understanding of their customs and mentality and is therefore in a better position to estimate the value of evidence than the Judicial Officer, whose contact with the natives of the Colony is both remote and transitory (p. 115).
>
> It may be admitted that Administrative Officers are not commonly so skilful in the conduct of judicial proceedings as are those who have made the practice of the law their profession, but in Kenya any lack of skill there may be is remedied to some extent at least by the system of revision by the High Court (p. 117).
>
> Were it not for the expense involved I should welcome the appointment of an additional Judge . . . (p. 121).

The Governor of Uganda, in his despatch (pp. 123–42), covers the whole debate. It is not possible to deal at length with his despatch, which must be read in its entirety. It is clear that he has a poor opinion of the value of judicial training. He writes:

> In paragraph 65 of their Report the Commission have recommended that a more extended use might be made of the services of professional resident magistrates. They state that they have it in evidence that much of the time of these magistrates is taken up in trying minor statutory offences. They suggest that this is a waste of time of a professional

> magistrate, but they make no suggestion as to by whom such offences should be tried. . . . I presume, therefore, that the Commission had it in the back of their minds that such cases might be tried by junior administrative officers. I venture to point out that the junior administrative staff already perform at least as much routine office work as is compatible with the necessity for allowing them time to devote to the study of languages, and for ensuring that they obtain as much experience as possible under the tuition of a senior officer of the duties which they will ultimately be called upon to perform themselves. I would therefore strongly deprecate any addition to the duties which are laid upon cadets and junior administrative officers. Further, with due respect to the Commission, I feel that the time of the professional administrator is as valuable as that of a professional magistrate, and I can see no justification whatever for imposing upon the former duties which the Commission consider would be a waste of time in the case of the latter. These minor statutory offences are precisely the class of cases in which local knowledge, which is the special qualification of the administrative officer, is of the least value, and I am strongly of the opinion that such minor statutory offences should in all cases where possible be tried by a permanent member of the judicial service (p. 133).

This conception is new to the present writer. It must, it is thought, be incorrect from a cash value, since the salary of a stipendiary magistrate is twice or even three times that of a junior administrative officer: it may be that some spiritual value is referred to. Later on in his despatch, the Governor writes:

> I consider that more effective steps can and should be taken to ensure that junior administrative officers obtain sufficient experience as magistrates (p. 142).

This means experience in the more difficult cases: the simpler cases being allotted to the trained judicial officer. Although a stipendiary magistrate may have spent ten years in the daily administration of justice to natives in the courts of the territory, yet his " knowledge of the native " is to be deemed incomparably less than that of a newly-arrived junior administrative officer.

As regards the Governor of the Tanganyika Territory, it is sufficient to make three extracts from his despatch:

> . . . I do not feel impelled to enlarge upon my ignorance of local conditions. My remarks are of a general nature, and if they can be regarded as carrying any weight at all, it can only be on account of a long administrative experience in another part of " native " Africa where similar problems have arisen (p. 154).
>
> At home the great edifice of legal procedure, built up in the course of generations of complex civilization, is familiar and ineluctable. To the

African, whose simpler life and outlook require no more than speedy justice for the complainant and for the accused, common sense, impartiality and understanding in those who try their cases are the only real requisites, and the rest is incomprehensibly superfluous and frequently onerous (p. 155).

It is, to my mind, not so much a matter of a (hypothetical) unfamiliarity with legal procedure being " more than compensated for by his (the Administrative Officer's) knowledge of native law and custom . . . language, mentality, outlook on life and environment " (paragraph 44), but of that knowledge being an essential pre-requisite (p. 157).

It is now desirable to consider the views of the administrative officers themselves on this matter. Mr. Hignell gave evidence. He is the Provincial Commissioner of the Central Province of Tanganyika. He has had long administrative experience in the Central Province and has acquired the complete trust of the primitive tribes of his province. He may safely be said to have a knowledge of the native. His opinion is as follows :

Chairman : You plead for a Resident Magistrate or District Judge to be stationed in the Province ?

Witness : I do not see any other way in which we are to get through the work and avoid these delays. . . . I feel about extended jurisdiction that it is not a part-time job for anyone.

Chairman : It is not a part-time job, nor is it a job for a man who has not been trained in law ?

Witness : That is the point I wish to make (p. 15).

The Chief Justice of Uganda said :

Sir Charles Griffin took the trouble to ascertain from the principal Administrative Officers of the various districts where the High Court had jurisdiction whether they had anything to complain about as regards loss of prestige. With one dubious exception, they all said : " No, certainly not. We like the High Court " (p. 22).

The writer's experience is the same as that of Sir Charles Griffin, except that he did not meet a dubious exception. All the senior administrative officers whom he met, without exception, welcomed the High Court, or if there was no circuit of the High Court in their province they asked whether it would not be possible to establish a circuit there. When the High Court opened its session, the senior administrative officer attended the court and as a mark of respect took a seat on the Bench : after a short time he withdrew, and proceeded about his business : nor ever after that was he found pining and haunting the court of his bygone hope and endeavour. The appointment of a stipendiary magistrate was always urged by senior administrative officers for places where the work of the courts was sufficient to warrant such an appointment. The view of administrative officers is that the administration of justice is a skilled matter which is best performed by a person with legal training.

Conclusion.—There are, therefore, two sharply divided opinions on the main question raised in the Report : (*a*) That the administration of justice to natives in the courts of law in East Africa is more efficiently carried out by administrative officers without legal training than by judicial officers with legal training. This is the opinion of all Governors, with rare and notable exceptions. (*b*) That the administration of justice to natives in the courts of law in East Africa is more efficiently carried out by judicial officers with legal training than by administrative officers without legal training. This is the opinion of all administrative officers and unofficial members of executive and legislative councils, with rare exceptions, and of all judicial officers.

The answer to this question given in the Report will, it is thought, be held by readers of this *Journal* to be conclusive.

THE CONSTITUTIONAL CAPACITY OF CANADA TO GIVE EFFECT TO INTERNATIONAL LABOUR CONVENTIONS.—II.

[*Contributed by* C. Wilfred Jenks, Esq.]

The Dominion Jurisdiction to give Effect to Treaties.—There was no explicit mention of s. 132 in the questions referred to the Supreme Court in the Hours of Labour Case, and the judgment, as has already been noted, does not discuss the applicability of the section. It confines itself to saying that the obligation under the Treaty is only an obligation to submit the proposals of the Conference to the competent authority or authorities, and reserves the question of the position which will arise if ratification is proposed. It then proceeds to indicate which are the competent authorities in respect of the Hours of Work (Industry) Convention on the basis of the normal distribution of legislative powers and without considering the meaning of the term " competent authority " in a country in which there exist not only the two types of authority thought of at Paris, the authority competent to legislate and the authority competent to ratify, but three, the authority normally competent to legislate, the authority competent to legislate in relation to ratification and the authority competent to ratify. This absence of any express mention of s. 132 is the more surprising in that the effect of the section had been discussed in the original report of the Minister of Justice upon the Washington Convention, though only in relation to its applicability to the obligations imposed by Part XIII itself.[1]

This mention of the matter suggests an interesting historical reflection. The original British plan contemplated that the International Labour Conference would have powers much more direct than those entrusted to it by the Treaty. The proposal taken as the basis of its work by the Commission on International Labour Legislation was that all Members of the Organization should be under an obligation to ratify Conventions within a specified time limit unless they were expressly disapproved by the legislature of the Member.[1] It follows from the reasoning of the Minister of Justice that had this proposal been adopted and had there been an obligation to ratify Conventions, Canada would have been competent to give effect to them. One is naturally led to scrutinize more closely a Constitution which would have permitted so notable a step forward, but under which it is alleged that the Dominion is incompetent to give effect to Conventions in the absence of an obligation to ratify.

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[1] International Labour Office, *Official Bulletin*, vol. ii, at pp. 11–12 of No. 15–16.

At the time when the Supreme Court gave its answers to the questions referred to it in *In re Legislative Jurisdiction Over Hours*, only one reported case upon the effect of s. 132 had reached the Privy Council—*Attorney-General of British Columbia* v. *Attorney-General of Canada.*[2] In this appeal the question raised was whether the Legislature of British Columbia had authority to enact a statute confirming certain Orders in Council and the provisions contained in various contracts, leases and concessions made by the Government stipulating that no Chinese or Japanese should be employed on work performed thereunder. The Act was held invalid as incompatible with the Japanese Treaty Act, 1913, the enactment of which by the Parliament of Canada was authorized by s. 132 of the British North America Act. While not directly relevant to the question of jurisdiction under s. 132 in respect of hours of labour, this case illustrates a point which has not since been considered by the Privy Council in so direct a form, the effect of legislation valid under s. 132 as invalidating incompatible Provincial legislation. Since the hours of labour reference there have been two Privy Council cases of the first importance. It will be convenient before discussing them to repeat the words of the section :

> The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries.

The first of these cases, *In re the Regulation and Control of Aeronautics in Canada,*[3] was an appeal from the Supreme Court of Canada to which the following four questions had been referred by the Governor-General under s. 55 of the Supreme Court Act :

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[1] International Labour Office, *Official Bulletin*, vol. i. Proposal submitted by the Delegates of the British Empire, Art. 18, at pp. 12–13.

[2] [1924] A.C. 203.

[3] [1932] A.C. 54.

(1) Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the convention entitled "Convention relating to the Regulation of Aerial Navigation"?

(2) Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a Province necessary or proper for performing the obligations of Canada, or of any Province thereof, under the convention aforementioned within the meaning of s. 132 of the British North America Act, 1867?

(3) Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of s. 4 of the Aeronautics Act, c. 3, Revised Statutes of Canada, 1927?

(4) Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting: (*a*) The granting of certificates, or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences; (*b*) the regulation, identification, inspection, certification and licensing of all aircraft; and (*c*) the licensing, inspection and regulation of all aerodromes and air stations? [1]

To question (1) as framed the Supreme Court unanimously answered "No." To question (2) the answer of the majority of the Court was "Considering the word 'general' in the question as equivalent to 'in every respect,' the answer is 'No.'" The answers given to questions (3) and (4) are of less direct interest for the purpose of the present discussion. The Attorney-General for Canada appealed, but confined the appeal to answers 1, 3 and 4, Counsel for the Dominion indicating to the Judicial Committee that in so restricting the appeal the Dominion was not acquiescing in the answer to question (2), but that the precise meaning of that question had provoked a great deal of discussion in the Supreme Court, and that since the substantial issues involved could be dealt with without further discussion of question (2), a course desirable for the further reason that the fact that military aircraft were not included in the Convention implied that the answer to the question as framed must technically be in the negative, it seemed desirable to concentrate the discussion upon the other questions.

It will be noted that the question thus before the Board was not merely whether the Dominion acting under s. 132 could regulate matters entrusted to the Provinces by s. 92, but also whether its obligations under the Convention were such as to make its authority not only " paramount," to advert to a distinction discussed before and by the Supreme Court, but " exclusive." This further question may be directly relevant to the application of certain International Labour Conventions, apart from which the manner in which it is discussed in the judgment of the Judicial Committee illustrates particularly well the temper in which the Committee is now disposed to approach questions of the respective competence of the Dominion and the Provinces.

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[1] [1932] A.C. 54 at pp. 55–6.

The argument for the Dominion was that under s. 132 the Parliament of Canada is the only legislature authorized to perform Treaty obligations, whether of Canada or of the Provinces, and that the Convention deals with so many topics that those obligations cannot be performed effectively without some regulations not directly within its terms.[1] To this Sir John Simon, K.C., for the respondent, the Attorney-General for Quebec, replied that " the word ' exclusively ' is not in s. 132, though it is in ss. 91, 92 and 93. S. 132 gives only such power as is necessary or proper for fulfilling the obligations referred to. If Provincial legislation adequately covers the matter, there is nothing for the Dominion to do under s. 132 ; the section does not prevent the Provinces from legislating as to a Provincial matter, though it is a matter concerned with aerial navigation." [2]

The judgment delivered by Lord Sankey on behalf of the Judicial Committee is one of great importance to which it is difficult to do justice, except by quotation in full, but in view of its length some attempt must be made to summarize its effect. In the course of discussing the relation between ss. 91 and 92, Lord Sankey remarked:

> But while the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole.[3]

He then refers to the cases in which an attempt has been made to formulate general conclusions upon this subject and, after quoting a well-known passage from *Attorney-General for Canada* v. *Attorney-General for British Columbia*,[4] adverts to the emergency powers of the Dominion. He then continues :

> It is obvious, therefore, that there may be cases of emergency where the Dominion is empowered to act for the whole. There may also be

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[1] [1932] A.C. 54 at pp. 56–9.

[2] *Ibid.* at pp. 59–61.

[3] *Ibid.* at pp. 70–1.

[4] [1930] A.C. 111, 118.

cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s. 132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.

. . . . .

Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal analysis. They consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as s. 132 is concerned, their Lordships are not aware of any decided case which is of assistance on the present occasion. It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out. It is only necessary to look at the Convention itself to see what wide powers are necessary for performing the obligations arising thereunder.

. . . . .

It is therefore obvious that the Dominion Parliament, in order duly and fully to " perform the obligations of Canada or of any Province thereof " under the Convention, must make provision for a great variety of subjects. Indeed, the terms of the Convention include almost every conceivable matter relating to aerial navigation, and we think that the Dominion Parliament not only has the right, but also the obligation, to provide by statute and by regulation that the terms of the Convention shall be duly carried out. With regard to some of them, no doubt, it would appear to be clear that the Dominion has power to legislate, for example, under s. 91, item 2, for the regulation of trade and commerce, and under item 5 for the postal services, but it is not necessary for the Dominion to piece together its powers under s. 91 in an endeavour to render them co-extensive with its duty under the Convention when s. 132 confers upon it full power to do all that is legislatively necessary for the purpose.[1]

There then follows the summing up :

To sum up, having regard (*a*) to the terms of s. 132 ; (*b*) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation ; and (*c*) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7, it would appear that substantially the whole

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[1] [1932] A.C. 54 at pp. 73–7.

> field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion ; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance ; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.[1]

A further aspect of the question of some political importance is referred to briefly in the judgment. Sir John Simon had put the point in the course of his argument [2] that the Air Regulations cannot be justified by the Convention as, subject to some amendments, they had been enacted before the Convention was signed.[3] The Board did not treat this as an objection to their validity. The origin of the Regulations is detailed in the following passage from the judgment :

> With a view to performing her obligations as part of the British Empire under this convention, which was then in course of preparation, the Parliament of Canada enacted the Air Board Act, c. 11 of the Statutes of Canada, 1919 (1st session), which, with an amendment thereto, was consolidated in the Revised Statutes of Canada, 1927, as c. 43, under the title the Aeronautics Act. It is to be noted, however, that the Act does not by reason of its reproduction in the Revised Statutes take effect as a new law. The Governor-General in Council, on December 31, 1919, pursuant to the Air Board Act, issued detailed " Air Regulations " which, with certain amendments, are now in force. By the National Defence Act, 1922, the Minister of National Defence thereafter exercised the duties and functions of the Air Board.[4]

Subsequent passages in the judgment uphold them as valid. It follows that the difficulty occasionally suggested that s. 132 can only be employed after an international obligation exists, but that no prudent Government will contract an obligation until it has secured the adoption of the necessary implemental legislation, is not well founded. There is nothing in the wording of s. 132 to suggest such a restriction. The principle of the section is that the acceptance and implementation of international obligations are a Dominion matter. Any distinction based on whether ratification has been effected or is only proposed is as unwarranted as it is artificial. Doubtless a pious aspiration to ratify will never confer competence, and in the case of any Convention the coming into force of which may be delayed for some time it may be prudent to include in the implemental Dominion legislation a clause suspending its taking effect until the coming into force of the Convention. If such a precaution is taken, there are no further difficulties to be feared. The objection under review, which was upheld in the Supreme Court in the judgments delivered by Duff J.[1] and Cannon J.,[2] but discountenanced in that of Smith J.,[3] has therefore lost its force.

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[1] [1932] A.C. 54 at p. 77.

[2] *Ibid.* at p. 61.

[3] *Sic* the Report but, in so far as the reference is to the Regulations, of date December 31, 1919, and not to the Act under which they were made, of date June 6, 1919, " signed " would appear to be an error for " ratified." The dates of signature and ratification were respectively October 13, 1919, and June 1, 1922.

[4] [1932] A.C. 54 at p. 63.

Helpful as it is, the opinion in the Aviation Case left one important point unsettled. S. 132 refers to the obligations of Canada "as Part of the British Empire, towards such Foreign Countries, arising under Treaties between the Empire and such Foreign Countries." After the Aviation Case there remained open the question of whether the obligations assumed by Canada by the ratification in her own name of international Conventions are obligations assumed by her "as Part of the British Empire" and "arising under Treaties between the Empire and such Foreign Countries." This question has now been satisfactorily answered by the Judicial Committee in *In re Regulation and Control of Radio Communication in Canada.*[4]

Before the Judicial Committee had given judgment in the Aviation Case, the Governor-General referred to the Supreme Court the following questions :

(1) Has the Parliament of Canada jurisdiction to regulate and control radio communication ?

(2) If not, in what particulars is the jurisdiction limited ?

A majority of the Supreme Court answered the first question in the affirmative and returned no answer to the second.[5] Against their judgment the Attorney-General for Quebec appealed, and the Attorney-General for Ontario intervened in his support. On their behalf it was argued that *In re Regulation and Control of Aeronautics*

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[1] [1930] S.C.R. 663, 686.—"The section was originally enacted before the Convention came into effect and could not therefore be treated as passed in execution of any power under s. 132. As reproduced in the Revised Statutes, 1927, it does not take effect as the enactment of a new law and to the extent to which it was invalid in 1919 it is invalid to-day."

[2] *Ibid.* at p. 719.—"It requires an existing treaty to give validity to legislation and not merely a prospective convention."

[3] *Ibid.* at p. 711.

[4] [1932] A.C. 304.

[5] [1931] S.C.R. 541.

in Canada did not apply, the reason being that it was decided mainly upon the grounds that upon that subject there was a treaty between the British Empire and Foreign Countries and that by the terms of s. 132 of the British North America Act, 1867, the Parliament of Canada had authority to perform obligations under a treaty of this kind, whereas in the case of radio communications there was no treaty entered into by the British Empire as an entity binding upon Canada as a constituent member of the Empire, but only an international Convention to which Canada was an independent party.[1] For the Attorney-General for Canada it was argued in reply that the change in the method in making treaties binding upon the Dominion does not affect the scope of s. 132 or take away the authority thereby conferred upon the Parliament of Canada to perform the obligations arising thereunder, but that even if s. 132 did not in terms apply to the Radiotelegraph Convention, the Parliament of Canada had similar authority under the power conferred upon it by s. 91 to make laws for the peace, order and good government of Canada as the matter was one of national importance and not within s. 92.[2] To this the rejoinder was made that if the Parliament of Canada had legislative authority to perform the obligations of the Convention, although it was not a treaty of the British Empire, s. 132 of the Act of 1867 was superfluous, and that there was only one case in which a subject assigned to the legislative authority of the Provinces could be brought within the general powers of the Dominion Parliament, that being where an emergency exists, a condition not here satisfied.[3] The judgment of their Lordships was delivered by Viscount Dunedin, who discussed the applicability of s. 132 in the following passage :

> It is however unnecessary to speculate as to what would have been the result had the learned judges known as we know now that the judgment of this Board (*In re Regulation and Control of Aeronautics in Canada*, delivered on October 22, 1931) settled that the regulation of aviation was a matter for the Dominion. It would certainly only have confirmed the majority in their opinions. And as to the minority, though it is true that reference is made in their opinions to the fact that as the case then stood aviation had been decided not to fall within the exclusive jurisdiction of the Dominion, yet had they known the eventual judgment it is doubtful whether that fact would have altered their opinion. For this must at once be admitted : the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the British North America Act, 1867, which is as follows : "The Parliament and

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[1] [1932] A.C. 304, 307.

[2] *Ibid.* at pp. 308–9.

[3] *Ibid.* at p. 309.

Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries." And it is said with truth that, while as regards aviation there was a treaty, the convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions. She only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the convention. But while this is so, the aviation case in their Lordships' judgment cannot be put on one side.

Counsel for the Province felt this and sought to avoid any general deduction by admitting that many of the things provided by the convention and the regulations thereof fell within various special heads of s. 91. For example, provisions as to beacon signals he would refer to head 10 of s. 91—navigation and shipping. It is unnecessary to multiply instances, because the real point to be considered is this manner of dealing with the subject. In other words the argument of the Province comes to this: Go through all the stipulations of the convention and each one you can pick out which fairly falls within one of the enumerated heads of s. 91, that can be held to be appropriate for Dominion legislation; but the residue belongs to the Province under the head either of head 13 of s. 92—property and civil rights, or head 16—matters of a merely local or private nature in the Province.

Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole, but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada *vis-à-vis* to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either s. 91 or s. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion the power to make laws "for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." In fine, though agreeing that the convention was not such a treaty as is defined

> in s. 132, their Lordships think that it comes to the same thing. On August 11, 1927, the Privy Council of Canada with the approval of the Governor-General chose a body to attend the meeting of all the powers to settle international agreements as to wireless. The Canadian body attended and took part in deliberations. The deliberations ended in the convention with general regulations appended being signed at Washington on November 25, 1927, by the representatives of all the powers who had taken part in the conference, and this convention was ratified by the Canadian Government on July 12, 1928.
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> The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.[1]

The result arrived at is clear enough, but the noble Viscount expressed himself in a somewhat tantalizing way. It would appear that the opinion of the Board is not that s. 132 is to be read and applied as though it were expressed to be applicable to treaties concluded by the present procedure, but that treaties as a class form a subject of legislative jurisdiction distinct from the varied topics which form their content, and that as this subject is not assigned to either the Dominion or the Provinces among the enumerated subjects of ss. 91 and 92, it falls within the general words at the opening of s. 91 and is therefore assigned to the Dominion. This view of the matter is shared by the writer of the headnote in the Law Reports, who summarizes the position thus:

> Great Britain, Canada (and other Dominions and Colonies) having entered separately into a Convention on the subject with foreign countries, the Parliament of Canada, under the general powers conferred upon it by s. 91 of the British North America Act, 1867, to make laws for the peace, order and good government of Canada, had in relation to the obligations under the Convention power similar to that which it would have had under s. 132 if the Convention had been a Treaty between the British Empire as an entity and foreign countries.[2]

Independently of the Radio Case, there is another ground on which Dominion jurisdiction under s. 132 can be supported. It is true that Canada is an independent member of the International Labour Organization, and that her practice has been to ratify International Labour Conventions by Dominion Order in Council, a procedure which emphasizes that the obligations which she thus contracts are undertaken by her on her own initiative and not as

[1] [1932] A.C. 304, 307 at pp. 311–13.

[2] *Ibid.* at p. 304.

part of the Empire.[1] But International Labour Conventions are not self-contained instruments, and once they have been ratified they are binding not merely in virtue of their own terms, but also in virtue of obligations contained in the Treaty of Versailles, which latter are incontestably binding upon Canada as a part of the British Empire under a treaty between the Empire and such foreign countries. Art. 405, para. 7, upon the effect of which, as has been noted above, the Supreme Court reserved its opinion in the Hours Case, provides as follows :

> 7. In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

This rather than their detailed terms is in the case of International Labour Conventions the source of the obligation to apply them. These Conventions are often drafted in the form of a series of rules expressed as a set of regulations rather than as an international engagement.[2] This is possible precisely because the obligation to enforce the rules thus set out is already contained in the Treaty, though it only becomes operative in respect of individual Conventions after ratification. The existence of this conditional obligation under Part XIII supports Dominion jurisdiction under s. 132 even without reliance upon the Radio Case. Taken together, the rejection by the Judicial Committee in the Aviation Case of the suggestion that s. 132 is not available to support legislation until the international engagement actually exists, the ruling given by the Committee in the Radio Case that the Dominion has authority to give effect to Conventions to which it is an independent party, and this existence of a conditional obligation under Part XIII, clearly suffice to rebut the suggestion that the Dominion is not entitled as a matter of constitutional law to give effect to International Labour Conventions should it so desire.

The Application of Art. 405 of Part XIII to Canadian Conditions.—The question now to be considered is that of the obligations imposed by Art. 405 upon a country in which there exists a threefold division of competence between: (*a*) authorities competent to legislate upon a given subject for municipal purposes; (*b*) an authority competent to legislate upon the same subject in order to give effect to an international engagement; and (*c*) an authority competent to undertake an engagement internationally.

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[1] The text of the Order in Council approving the ratification of the four conventions hitherto ratified by Canada will be found in International Labour Office, *Official Bulletin*, vol. xi, No. 3, p. 96.

[2] Recent illustrations are : the Hours of Work (Coal Mines) Convention, 1931 ; the Protection against Accidents (Dockers) Convention (Revised), 1932 ; the Minimum Age (Non-Industrial Employment) Convention, 1932 ; and the Fee-Charging Employment Agencies Convention, 1933.

The difficulty of the case arises from the fact that no distinction between cases (*a*) and (*b*) was contemplated as possible at Paris. A Canadian reader, familiar with his own constitutional system and particularly with the normal line of demarcation of constitutional competence, but not so fully at home when dealing with international texts, may not unnaturally conclude that the words "undertakes that it will . . . bring the Recommendation or Draft Convention before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action" refer to the authorities mentioned above under (*a*); but it is clear that where any distinction between authorities (*a*) and (*b*) exists so to interpret the paragraph is to frustrate its whole object. Elementary principles of interpretation require that the text of Art. 405 should be read as a whole, and if this be done it is clear, even if historical evidence be excluded, that in such a case it is to authority (*b*) that Draft Conventions must be submitted. Para. 9 of the Article is not applicable to the case under discussion, since it only refers to cases to which constitutional limitations apply, which, as has been shown, is not here the case. The relevant paragraphs are therefore paras. 5 and 7. Para. 5 refers to the "authority or authorities within whose competence the matter lies, for the enactment of legislation or other action," and para. 7 declares that the Member will, "if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the Convention to the Secretary-General," etc. If these paragraphs are read together it is clear that the obligation is to submit Draft Conventions to the authority competent to enact legislation for the purpose of giving effect to the Convention, or, in the case of Canada, to the Dominion Parliament. The purpose of the article, which is to oblige Governments to ensure that the proposals of the Conference receive proper parliamentary consideration with a view to their ratification, is not fulfilled by their formal reference to ten distinct authorities action by none of which can, as the facts of experience show, achieve this result.

This view of the matter is confirmed by the French text, which is of equal authenticity with the English. The French version of the paragraph is as follows :

> 5. Chacun des Membres s'engage à soumettre dans le délai d'un an à partir de la clôture de la session de la Conférence (ou, si par suite de circonstances exceptionnelles, il est impossible de procéder dans un délai d'un an, dès qu'il sera possible, mais jamais plus de dix-huit mois après la clôture de la session de la Conférence) la recommandation ou le projet de convention à l'autorité ou aux autorités dans la compétence desquelles rentre la matière, en vue de la transformer en loi ou de prendre des mesures d'un autre ordre.

The literal English rendering of this would be : " . . . the authority or authorities within whose competence the subject falls for the purpose of transforming it (which refers to the Convention) into municipal law." The French is not the original text and does not correspond literally with the English, but it is of equal standing with it and unquestionably supplies the right interpretation of its meaning. The text being clear, it is unnecessary, according to the principles laid down by the Permanent Court of International Justice, to look into the preparatory work,[1] the Minutes of the Commission on International Labour Legislation of the Peace Conference. It is even doubtful whether these documents are admissible as evidence in any circumstances, for in the *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* the Court formulated the principle that preparatory work is never admissible against States which have not taken part in it, and that where some of the parties to a treaty did not participate in preparatory work it cannot, even though published, be pleaded even in proceedings between parties which did.[2] It may be that this principle is subject to some exception in the case of constitutional documents such as the Covenant and Part XIII which are drafted, with the exception of a few unfortunate examples of excessive precision, in a suggestive rather than a detailed style, and the preparatory work of which has been widely discussed throughout the world ; but even if no such exception be justified it is of some interest as a matter of history that the preparatory work of Part XIII contains nothing to weaken and much to support the above interpretation. The facts of the Canadian case were not considered, but as to the application to them of Art. 405 as drafted, none of its draftsmen could have entertained the slightest doubt. Their

[1] P.C.I.J., B. 2 at p. 41, B. 12 at p. 22, B. 14 at p. 31.

[2] P.C.I.J., A. 23 at p. 42.

intention certainly was to thrust upon the Parliament of Canada the responsibility of deciding in respect of each Convention whether or not it is prepared to exercise admittedly exceptional powers to give effect to the proposals of the Conference.[1]

Professor Berriedale Keith has admittedly taken a different view. In the second edition of his *Responsible Government in the Dominions* he writes :

> The second point is whether under the Treaty of Peace the real obligation is not to bring a convention before the authority which can consent to ratify, and this authority is the Parliament of Canada. This is ingenious, but it is not the natural interpretation of the Treaty of Peace provisions, which in point of fact were deliberately inserted to meet the case of federal States where the central authority has normally not a general power to deal with issues such as concern the Labour Organization under the Treaty of Peace. No doubt if Canada should ratify by executive action, then the Dominion could legislate, but, despite the legality of such a course, it would normally be unconstitutional.[2]

It will be noted that Professor Keith admits that in law the Dominion has an unfettered discretion as to when it will rely upon s. 132, but that he argues that this discretion is limited by constitutional usage. Constitutional usage is notoriously a shifting thing. " The great generalities of the Constitution," to quote a phrase of Mr. Justice Cardozo," have a content and a significance that vary from age to age."[3] His words are doubly appropriate when applied to usage as distinct from law. The Canadian Constitution has not yet existed for a century ; there is considerable doubt as to the formalities required for its modification ;[4] and it is inconceivable that the usages of little more than half a century are to fetter permanently the freedom of action of the Dominion in a sphere of ever-growing importance in respect of which the text of the Constitution gives it plenary powers. In his references to " the whole mass of labour Conventions," the " utter overthrow of provincial autonomy," and the " natural authority to legislate," Professor Keith betrays a certain lack of evolutionary sense. What is proposed is not the " utter overthrow of provincial autonomy " but the gradual acceptance by Canada, by a procedure expressly provided for in the Constitution, of a new body of international law forced upon man-kind by the facts of modern experience. The above, however, are but general rejoinders to general objections. Professor Keith's more detailed argument is that the interpretation of Art. 405 suggested above is ingenious but not the natural interpretation of the Treaty. With due respect to the learned author, it is not particularly ingenious and is the only admissible interpretation of the Treaty. The case of "federal States in which the central authority has normally not a general power to deal with issues such as concern the Labour Organization under the Treaty of Peace" is not the case provided for by the Treaty. It was not contemplated as possible when the Treaty was drawn up, and the strictly exceptional provision contained in Art. 405, para. 9, must be strictly construed and cannot be extended to apply to it.[1] The reference is to "a federal State the power of which to enter into *Conventions* on labour matters is subject to limitations." Professor Keith himself admits that the power of the Dominion to enter into such Conventions is not subject to any legal limitation. It follows that the Dominion Government is not entitled under the Treaty to treat Draft Conventions as recommendations merely because the normal distribution of legislative authority assigns their subject-matter to the Provinces. Whether or not it will ratify any particular Convention is entirely within its discretion, but it is under a treaty obligation to exercise its discretion on the basis of the facts of each particular case.

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[1] For detailed references see footnote, p. 202 of vol. xvi.

[2] For a fuller development of Keith's views see 2nd ed., 1928, vol. i, at pp. 579–81.

[3] *The Nature of the Judicial Process*, at p. 17.

[4] An imperial Act is still required, but it is controversial whether the Provinces or any of them must concur in the request for such an Act by the Dominion necessary since the coming into force of the Statute of Westminster.

It should be noted that Art. 416 of Part XIII provides that:

> In the event of any Member failing to take the action required by Art. 405, with regard to a recommendation or draft convention, any other Member shall be entitled to refer the matter to the Permanent Court of International Justice.

It would also be competent to any of the organs of the International Labour Organization to invite the Council of the League to request the Permanent Court of International Justice to give an advisory opinion upon the matter. In virtue of Art. 423, which provides that any question relating to the interpretation of Part XIII shall be referred for decision to the Court, the Court's opinion, even though given as such and not taking the form of a judgment in a case between parties, would be binding upon all concerned. It need hardly be said that the Permanent Court is not entitled to place its own interpretation upon the British North America Act, but that it is competent, and exclusively so, to consider the application to the constitutional position resulting from that Act, as explained in the decisions of the Judicial Committee as a court of last resort, of the provisions of Art. 405 of the Treaty.[1]

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[1] Cf. P.C.I.J., B. 4, at p. 25 with reference to Art. 15, para. 8 of the Covenant.

Criticism of the line of argument advanced above must naturally be anticipated from the champions of Provincial authority. To quote one such writer, the Dominion " cannot expand her legislative powers by agreeing that she will expand it," [2] or as a self-styled Jeffersonian Democrat once put it to the writer, " we have struggled for generations against Washington. We have no intention of capitulating now to Geneva." Yet when full allowance has been made for this type of view there remains the point that in other federations the existence of a special power to give effect to international engagements no matter what their subject-matter has not been considered incompatible with the existence of a federal system.[3]

Federalism, as both Bryce and Dicey taught us long ago, is of all political systems that which is most based upon compromise, and there is nothing surprising in that it should be part of the compromise that the normal distribution of legislative powers designed for municipal purposes should be qualified for the purpose of making possible effective participation in international affairs by the existence of a special power to implement properly assumed treaty commitments. The mention of " properly assumed " is a necessary reservation. If the existence of such a special power is part of the compromise on which federation is based, it is clear that the federal authorities must respect the spirit of the compromise and not have resort to the power for no other purpose than that of defeating the normal distribution of legislative competence. The Supreme Court of the United States has relied, in upholding a number of treaties, on the fact that they deal with subjects proper for international regulation.[4] Yet even though this be so, it is clear that the number of subjects proper for international agreement must inevitably grow as common international interests become more numerous ; and while it might not be difficult in some cases to decry bilateral treaties as dodges intended to make possible a usurpation of legislative competence, multilateral Conventions adopted by general international Conferences would seem entitled to a much stronger presumption in their favour against such a construction of their object. It may be a reason for the acceptance of a particular Convention by a particular State that it will thereby become entitled to regulate internally a question otherwise outside its jurisdiction, but it is submitted that this will not affect the validity of such an acceptance or of legislation implementing it if independently of this question of motive the subject-matter of the Convention is one proper for international agreement, "propriety for international agreement," like its converse the question of whether from an international point of view a certain matter is or is not within the reserved domain of exclusive State jurisdiction, being an essentially relative question depending upon the development of international relations.[1] The fact that there exist international organizations set up by treaty for the promotion of certain purposes will normally, it is submitted, be conclusive evidence that agreements prepared by such organizations acting within the limits of their competence are proper for international agreement. This implies, for instance, that a question may be a proper one for international agreement where there is no bargain of an obviously contractual character providing for the direct exchange of reciprocal advantages, but only an agreement formulating common norms of conduct which has been drawn up in response to a widespread conviction that the question dealt with has become of such importance to the general welfare of the world community that the establishment of international standards in respect of it has become indispensable.

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[1] For the practice of the Court when called upon to apply municipal law see P.C.I.J., A. 20 at p. 46 and A. 21 at p. 124.

[2] J. S. Ewart, K.C., in *Canadian Bar Review*, vol. x, No. 5, at pp. 298–303.

[3] For the United States see *Missouri* v. *Holland* (252 U.S. 416, 40 S. Ct. 382). For Australia see *Minutes of Evidence before Royal Commission on the Constitution*, 1927, at pp. 1410–11. For Switzerland see parliamentary discussions preceding ratification of the Geneva Opium Convention of 1925.

[4] See *United States* v. *Forty-three Gallons of Whiskey* per Davies J., 93 U.S. 1881, *Downes* v. *Bidwell*, 182 U.S. 244, and particularly *Geoffroy* v. *Riggs*, 133 U.S. 258, 266.

Conclusions.—It remains to summarize, within as brief a compass as possible, the thesis set forth in the foregoing pages.

The opinion of the Supreme Court in the Hours Case is far from conclusive of the question of Dominion jurisdiction to give effect to International Labour Conventions. The opinion expressly reserves the question of the position which will arise in the event of it being proposed to ratify a particular Convention, and in any case it is an opinion and not a judgment, as stated by the enactment under which the Supreme Court had jurisdiction to give it to be advisory only, and is only the opinion of an intermediate Court of Appeal and not that of the court with final jurisdiction in the matter—the Judicial Committee. Various proposals for the limitation of the right of appeal to the Judicial Committee are now under consideration, but few of them involve the abandonment in the near future of appeals in constitutional cases. As the opinion in the Hours Case is only advisory, the weight of its authority is determined by the extent to which the arguments relied upon are convincing. Examination shows them to be quite unconvincing. The questions put to the Court were stated in such a manner that the substantial questions at issue were never properly before it. It would be desirable in any future case of a comparable character that national courts should request the Director of the International Labour Office to place at their disposal any information in his possession upon the questions before them for determination. Where this has not been done any persuasive value which might otherwise attach to national judicial decisions in the eyes of international authorities will be strictly limited, since there will not be an adequate presumption that the international implications of the questions at issue have been sufficiently kept in mind by the national tribunal.

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[1] Cf. P.C.I.J., B. 4, at p. 24. Several American writers have argued at length in support of the relative and changeable character of propriety for international agreement. See particularly: Thomas I. Parkinson, "Constitutionality of Treaty Provisions affecting Labor" in the *American Labor Legislation Review*, vol. ix, 1919, pp. 21–32; J. P. Chamberlain, "The Power of the United States under the Constitution to enter into Labor Treaties," *ibid.* at pp. 330–8; and Francis G. Wilson, "International Labor Relations of Federal Governments" in *The South-western Political and Social Science Quarterly*, vol. x, No. 2, September 1929.

Since the Supreme Court gave its opinion in the Hours of Labour Case the Judicial Committee has given two opinions which strongly suggest that it would be possible to give effect to International Labour Conventions on the strength of s. 132 of the Constitution. Since *In re Regulation and Control of Aeronautics in Canada*, it is no longer possible to allege that legislation will not be valid under this section if it is enacted before ratification of the Convention to which it is intended to give effect. Since *In re Radio Communications in Canada*, there is no ground for holding it to be a difficulty that Labour Conventions are concluded by Canada independently and that the obligations assumed thereby do not arise out of treaties between the Empire and such foreign countries. Even had this difficulty not been set aside by the Radio Case, it would not apply to Labour Conventions, since once they have been ratified there is an obligation to apply them resulting from Art. 405, para. 7, of Part XIII, and therefore arising out of a treaty between the Empire and foreign countries. The existence of such a power in the Dominion has a parallel in other federations. It is inherently reasonable, is not inconsistent with the essentials of Federalism and results from the application of the principles of interpretation recognized by both the Judicial Committee and the Supreme Court of the United States as most appropriate for the interpretation of constitutional instruments.

The existence of the Dominion power to give effect to international engagements suggests that the Dominion may have misconstrued its international obligations by treating the Provinces as the competent authorities for the consideration of the majority of Conventions. The Dominion is free to decide in respect of each Convention whether or not it will ratify, and it will naturally take into account its relations with the Provinces in coming to a decision, but it is under a treaty obligation to consider ratification upon its merits in respect of each Convention and not to adopt a procedure the effect of which is the automatic reference of certain Conventions to Provincial legislatures, action by which cannot in practice lead to their ratification.

In the above pages, the bones of the problem have been set forth rather after the manner of a legal anatomist. No reference has been made to the practical considerations which form an essential part of the problem of labour legislation by Dominion action. This has been done in the belief that a treatment of the strictly constitutional and international aspects of the question may not be without value. Once certain legal myths cease to hold sway, the practical considerations which now weight the scales against interference with Provincial autonomy will have to hold their own against the equally practical considerations which argue in favour of effective Canadian participation in international labour legislation.

BROADCASTING AND COMPARATIVE LAW.

[*Contributed by* B. A. Wortley, Esq., LL.M., *Reader in Law in the University of Birmingham.*]

Problems Raised by Broadcasting.—Every invention that has facilitated communication has given rise to its own peculiar economic and legal problems. The steam locomotive and the aeroplane, the telephone and the telegraph have each, in turn, raised new difficulties for lawyers and parliamentarians. Wireless telegraphy is no exception to the rule, although the legal problems raised by this invention have rarely been acute and consequently have not received much discussion in England hitherto ; perhaps this is because of the establishment of the British Broadcasting Company and the consequent absence in this country of any commercial broadcasting stations of the more offensive type. The problems raised by broadcasting seem, however, to have been more serious abroad, at any rate they have given rise to a considerable crop of legal literature on the Continent. Perhaps this literature may help us to solve our own future problems. Certainly foreign broadcasts are forcing themselves on our attention to an ever-increasing extent. A few turns of the dial of any modern receiving-set suffice to bring into the very intimacy of the home, political and commercial propaganda of every description. Indeed, it is even possible, as recent events have proved, to be able to " listen-in " to actual constitutional upheavals in some of the less tranquil European countries. Forbidden lotteries and games may be effectively advertised in this country through the medium of a foreign wireless station. And no legislation can completely suppress such advertisements.

Broadcasting is beyond purely national control, it is a matter in which international co-operation is essential, but before we can effectively co-operate with foreign countries we must try to learn their points of view. Two recent French works have gone a long way to make this possible, and their authors deserve our warmest thanks.

Dr. Louis C. Bollecker has given us a comprehensive survey of private law problems in his *Droit privé de la Radiodiffusion*,[1] while Dr. Robert de Leusse has dealt in detail with the rights of authors in *L'Auteur et la Radiodiffusion*.[2] Both authors have presented their subjects from a comparative law point of view.

Judicial Adaptation of Existing Law.—The aim of law is justice. When a judge is faced with a group of facts for which there is no predetermined legal solution, he is inevitably thrown back upon his own notions of justice and expediency when he seeks to solve his problem. His solution may be the result of what Gény calls "*libre recherche scientifique*," or it may be deduced by a somewhat less scientific and objective process, from what Mr. Justice Holmes has called the judge's "indefinable major premise." But however he finds his solution, a modern judge usually makes a gallant attempt to adapt and use the obsolete tools of his legal workshop in order to do justice in any new case put before him. Doctors Bollecker and de Leusse have shown how infinitely interesting is the judicial process of adapting old law to new needs; but they have also shown, in the opinion of the writer, the undesirability of patching up parts of the legal system where a complete overhaul is really desirable in the interests of both justice and immediate expediency.

Nevertheless, it seems equally patent that it is impossible, and indeed, undesirable, to try to produce world legislation that does not take into account the social and economic difficulties which are peculiar to separate countries. Both Bollecker and de Leusse discuss the rights of the owners of copyright and the claims of the State, and they point out that countries so widely separated in distance, but so similar to each other in social conditions, as Australia, Norway and New Zealand have very similar views with regard to the State's right to broadcast copyright matter.[3] To each of these three sparsely populated states, wireless is of unusual national importance; it is by far and away the most effective method by which the Government may communicate with its scattered population. Other countries need not attach the same importance to broadcasting, and can afford to deal more leniently with the owners of copyrights. With the exception of Russia, however, it seems to be almost universally agreed that an author is entitled to some remuneration for the use of his work for broadcasting purposes, but the scale and manner of his remuneration varies, and is bound

[1] Paris: Recueil Sirey, 1934, pp. ix + 252.

[2] Paris: Recueil Sirey, 1934, pp. 171.

[3] See, for example, Bollecker, *op. cit.*, p. 97, and note the warning!

to vary, from one country to another. Both Bollecker (p. 93) and de Leusse (p. 99) show that in practice this is the case in their respective accounts of proposition II bis, for the revision of the Berne Convention settled at Rome on June 2, 1928. This original proposal read as follows :

> Authors of literary and artistic works shall enjoy the exclusive right to authorize the communication of their works to the public by wireless telegraphy or telephony or by any other analogous methods. . . .

But as a result of the action of Australia, New Zealand and Norway, who insisted on the State's right to broadcast any work on payment of a reasonable fee, the original proposition was modified by the addition of a second paragraph reading as follows :

> It is in the province of national legislation to regulate the conditions of the exercise of the right set out in the preceding paragraph . . . an equitable remuneration is to be settled, in the absence of agreement, by the competent authority.

Wireless Copyright.—In England, questions of wireless copyright seem to have been somewhat simplified by the arrangement made between the B.B.C. and the Performing Rights Society, whereby, according to a recent *Times* correspondent, " some two years ago the B.B.C. agreed to make an annual payment to the society for the use of all the copyright music in its répertoire." This example of collective bargaining has not been free from criticism, but it has at least had the advantage of checking a possible flood of litigation on copyright matters. At present, with the technical improvement of receiving sets, the greatest danger to English owners of copyrights would seem to be in the unauthorized broadcasting of copyright matter from abroad. The protection afforded to authors by the French and other systems of law is therefore of considerable interest to English copyright owners. It is in connexion with the law of copyright that Doctors Bollecker and de Leusse most strikingly, if not intentionally, show the dangers of the pouring the wine of the old French Revolutionary law of copyright into the new bottles of to-day's legal problems.

Both de Leusse and Bollecker attempt, with infinite ingenuity and resource, to adapt the ancient French law of copyright to the modern problems evoked by wireless telegraphy : each author proceeds by his own distinct and independent method.

Dr. de Leusse,[1] following M. Sandemont, takes the view that the sending out of wireless waves neither keeps nor records anything, and concludes that broadcasting constitutes a performance (*représentation*) of a work. Consequently, he suggests that an author should seek the protection (1) of Art. 3 of a decree of January 19, 1791, forbidding theatrical performances of the works of living authors without their written permission under penalty of confiscation of all profits; and (2) of Art. 428 of the Penal Code, which punishes by fine and confiscation of receipts those arranging a "spectacle" contrary to the law relating to authors' rights.

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[1] *Op cit.*, p. 17.

De Leusse admits that these texts probably only envisaged the protection of dramatic works when performed in a theatre, but he boldly extends the meaning of the texts, and comes to the conclusion (p. 26), that we must take the references therein to the theatre to include any means of publicity, and that by the expression "dramatic work" we must understand any intellectual production (*ouvrage de l'esprit*).

This seems, at first sight, a far cry from our English method of interpretation; but "extensive" interpretation of copyright statutes is not unknown to English law. In *Messager* v. *B.B.C.*,[1] McCardie J. held that broadcasting involved a performance of a work within s. 35 (1) of the Copyright Act, 1911, which defines a performance as "any acoustic representation of a work . . . including such a representation made by means of any mechanical instrument." This interpretation was not denied when the case was taken to Appeal, and it was recently followed by Maugham J. and the Court of Appeal in *Performing Rights Society* v. *Hammonds Bradford Brewery*.[2]

Dr. Bollecker, however, considers this *représentation* theory to be unsatisfactory, although it has been widely adopted by the courts in France. He does not hesitate, for example, to characterize "too wide" an interpretation of Art. 428 of the Penal Code as "*une enormité juridique.*"[3] After criticizing existing case law in France relating to wireless copyright, the author comes to the conclusion that the prevalent extensive interpretation of texts "makes them overflow their natural limits to such an extent that it is impossible to deduce a rational system from them."[4] Dr. Bollecker's own theory starts with a comparison beween the production of wireless waves and the making of gramophone records. "In both cases," he says, "an adequate installation permits the mechanical recreation of the music or words that have indented the record or modulated the waves." [1] Why, then, should not wireless waves constitute an *édition* of the performance they record just as much as gramophone records do ? The durability or otherwise of electromagnetic wireless waves is of no more importance than the durability or fragility of gramophone records ; the general principle is, he says, that each may constitute an *édition* of a work. The author points out that there may be an infringement of a copyright even if a work is printed in invisible ink,[2] and so on.

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[1] [1927] 2 K.B. 543.

[2] [1934] Ch. 121.

[3] *Op. cit.*, p. 65.

[4] *Op. cit.*, p. 68.

If this *édition* theory is accepted, then the law of 1793, which gives authors the exclusive right to sell, distribute and assign their rights in the territory of the Republic, is in point, and may be applied to protect authors from infringement of their copyright by wireless broadcasting.

The value of this method of interpretation is stressed over and over again in Dr. Bollecker's book,[3] and no doubt, if acceptable to the French courts, and presumably precedent would not necessarily prevent its adoption there, this theory may do good service until authors can be adequately protected in some other way, for example, by a properly drawn-up statute, made preferably on the basis of international agreement. At any rate, Dr. Bollecker argues very strongly for a use of the article of the law of 1793, which does not particularize the nature of the presentation of a work to anything like the same extent as does the article of the law of 1791 to which Dr. de Leusse appears to give so much weight.[4]

Republication by Telephone Companies.—In a short article such as this, it is impossible to discuss all the many problems that broadcasting raises, or to do justice to the ample erudition of the authors under review. But we may notice one or two further points of general interest.

Dr. Bollecker [5] disapproves of the decision of the Court of Amsterdam refusing to restrain the republication of broadcast matter by telephone companies who redistribute broadcast performances to their subscribers through their telephone systems. In England, we may remark, there would be no difficulty in objecting to such a reproduction when it is done for gain, at any rate if it takes place in public.[6] The legal position is perhaps less certain in English law when the reception by telephone of a broadcast performance takes place in the privacy of subscribers' homes. The question in this case would seem to be whether or not broadcasting may amount to a public performance within the test laid down by Lord Hanworth in *Harms* (*Inc.*) *Limited & Chappell & Co.* v. *Martano Club*,[1] where it was held that there was a public performance in a private club because, " a number of persons had an opportunity of enjoying the production who were of the class likely to go to a similar performance if an entrance fee were required. . . ." There is no entrance fee payable in respect of the reception of broadcast performances in England, unless indeed some proportion of the wireless licence can be regarded as such, but it is doubtful whether the sum paid by the B.B.C. to the Performing Rights Society would be diminished by the fact that some people might listen-in to a telephone instead of to their own wireless set.

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[1] *Op. cit.*, p. 76.
[2] *Op. cit.*, p. 77.
[3] Pp. 80–4, 118 and 138.
[4] See Bollecker, *op. cit.*, p. 80 ; de Leusse, pp. 18–26.
[5] *Op. cit.*, p. 144.
[6] *Performing Rights Society* v. *Hammonds Bradford Brewery*. *Cit. ante.*

Protection of Wireless Users.—Dr. de Leusse's work is mainly concerned, as its title indicates, with the rights of authors, but he does not confine himself to purely private-law questions, and in Chapter VII he has an excellent account of the *droit administratif* available in France when an individual seeks to claim in respect of a broadcast from a State station. If Dr. Bollecker's work is mainly confined to private law he does not limit his attention to questions of copyright. At p. 214, for example, he discusses the protection afforded by French law, under Art. 1384 of the Civil Code, to wireless users whose enjoyment of radio performances is marred by the interference of electrical machines. He quotes recent decisions of the courts of Amiens and Versailles which show that " the *normal* use of an electrical apparatus may render its proprietor liable if the perturbations caused thereby exceed his ordinary duties to the neighbourhood." Complaints have not been lacking in England of interference with broadcasting reception caused by the working of electrical apparatus such as rectifying plants. But so long as *Eastern and South African Telegraph Co.* v. *Cape Town Tramways* [2] is followed in this country there would seem to be little possibility of obtaining redress for such interference in the English courts. This sort of interference may well be a ground for legislative action in the future.

Defamation.—Defamation by wireless presents its own peculiar forms and problems. Both Bollecker [3] and de Leusse [4] discuss the celebrated case of *Franz and Charny*.

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[1] [1927] 1 Ch. 520.

[2] [1902] A.C. 381.

[3] Pp. 109 *et seq.*

[4] Pp. 84 *et seq.*

In that case a French radio station advertised and announced a recital of songs to be sung by M. Franz and Mme. Charny, but omitted to say that the performance would be given by gramophone records only. The Conseil d'Etat found that as in fact the artists had suffered no damage, they had no remedy at law, although as Bollecker remarks, they might have been very much surprised at the sound of their own voices when broadcast. The artists might have fared better in England : if the performance had been broadcast in England and was such as to lessen their reputation, they could no doubt have sued for defamation, because the slander would have been one concerning them in their profession and would have been actionable without proof of special damage.

Further, an ingenious advocate might even suggest that there was a separate publication of the defamation at every place where the defamatory broadcast was received : at any rate if the broadcast took place in England. But, of course, there would be no claim for damages in England in respect of the making and reception in France of such a broadcast, as that in the *affaire Franz and Charny*, where there was no proved damage and consequently no actionable wrong in France : the *locus delicti*.

Need for an International Convention.—Perhaps these few examples may serve to show the nature and value of the books under review, as well as the present uncertainty and confusion of the law relating to wireless, in Europe. Many other examples of conflicting and unsatisfactory laws could be cited. In fact there seems to be a real need for an international convention relating to broadcasting which can be adopted by all countries that have similar problems to solve. Broadly uniform legislation would certainly do something to lessen possible conflicts of laws. In concluding we cannot do better than to adopt Dr. Bollecker's words when he says (p. 148) :

> Il serait au plus haut degré souhaitable que les mêmes problèmes soient envisagés et résolus de la même manière des deux côtés des frontières, ne serait ce que parce que la diffusion radiophonique est une matière essentiellement internationale.

BYNKERSHOEK'S OBSERVATIONES TUMULTUARIAE.

[*Contributed by* PROFESSOR R. W. LEE, D.C.L.]

Early Life and Career.—Cornelis van Bynkershoek is an outstanding figure in the legal history of the eighteenth century.[1] Born at Middelburg in 1673, the son of a sail-maker, he was sent at the age of 16 to the University of Franeker in Friesland. Like Lord De Villiers, whose long judicial career recalls his own, he soon abandoned theology for law. The timely interposition of Cornelis van Eck, a Professor in the Faculty of Law, whose lectures Bynkershoek had attended, procured the consent of his parents. After attending the courses of van Eck, Sebastian Schelkens and the more famous Ulrik Huber, Bynkershoek in 1694 proceeded to the degree of *doctor utriusque juris*, and soon established himself as an advocate at The Hague. He conceived a poor opinion of his professional colleagues, which he was at no pains to conceal. It found expression in a satirical periodical published at the time, of which he is with reason supposed to have been the author, and quite as forcibly in the preface to his *Observationes Juris Romani*, published in 1710, when he had been already for six years on the Bench.

It was in the year 1704 that Bynkershoek, now 31 years of age, was appointed a member of the Supreme Court (*Hooge Raad*) of Holland, Zeeland and West Friesland. In 1724 he became its President, retaining this office until his death in 1743. Again, his career presents a remarkable parallel to that of De Villiers, who at the same early age became Chief Justice at the Cape, and when he died in 1914, after holding for four years the office of Chief Justice of the Union, had been on the Bench forty-one years, two years longer than Bynkershoek.

His Works.—But Bynkershoek, unlike De Villiers, besides being a great judge was a prolific author. Not to speak of early essays in Roman Law, mention may be made of his *Dissertatio de Dominio Maris* (1703), *Liber Singularis de Foro Legatorum* (1721), *Observationes Juris Romani* (1710 and 1733), *Quaestiones Juris Publici* (1737) and *Quaestiones Juris Privati*, published in 1744, the year after his death. His reputation as an International Lawyer rests upon the first two of the above-mentioned works and upon the *Quaestiones Juris Publici*. He takes rank as one of the "founders[1] of International Law." The great place which he occupies in the legal history of his own country rests upon a prolonged period of judicial service in which his vigorous personality found a congenial field of expression, upon his *Quaestiones Juris Privati* (which appeared also in a Dutch translation), and upon the known fact that he had left behind him unpublished works of exceptional interest. Of these, in particular, some account will now be given.

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[1] See *Journ. Comp. Leg.*, New Series, vol. ix (1908), p. 27, for an account of Bynkershoek, by Dr. Coleman Phillipson, reprinted in *The Great Jurists of the World* (Continental Legal History Series (1913)].

Unpublished Works.—By his will Bynkershoek bequeathed to his son-in-law Willem Pauw, who rather more than a year before his father-in-law's death had become his colleague upon the Bench, various unpublished works with strict injunctions that they were on no account to be given to the press. These included a commentary in Latin on the law of Holland (*Commentarii juris Hollandici*) and a collection of notes of cases which came before the court during the whole period of his judicial life. It had been his habit to record, day by day as they occurred, matters of interest, noting the arguments of counsel, sometimes the authorities cited, the decision of the court, dissenting opinions, if any, and in particular his own opinion whether in agreement or disagreement with the judgment of the majority. To these notes, written for the most part in Latin, sometimes in Dutch, or partly in either language, he gave the name of *Observationes Tumultuariae.* There is frequent reference to them in his *Quaestiones Juris Privati*, in the Preface to which work his editor Pauw speaks of them as follows :

> Cum passim in his Libris provocetur ad Observationes Tumultuarias, monendum est hoc nomine significari commentarios, in quos retulit Vir Ampl. non tantum res, ipso Senatore vel Praeside, id est per spatium quadraginta fere annorum, a Supremo Senatu judicatas, sed quicquid per totum illud tempus ab ipso Senatu memoria dignum actum gestumque est. Tumultuarias has Observationes vocat quod ex senatu domum redux, quotidie, prout quaeque res incidebat, tumultuarie eas conscripserit. Composuit hoc opus Ampl. Bynkershoekius ad usum privatum, non in memoriam posteritatis, et ne unquam in publicum ederetur, ultimo elogio vetuit.

The collection begun by Bynkershoek was continued by Pauw during the whole of his judicial career terminated by his death in 1787. Since 1784 he had been President of the Court.

It will be seen that the *Observationes Tumultuariae* of Bynkershoek and the *Observationes Tumultuariae Novae* of Pauw between them cover more than four-fifths of the eighteenth century. They are of unique value to the student of the law of Holland—all the more so that this century is not fruitful in institutional works, such as those which had laid the foundations of the Roman-Dutch Law in the seventeenth century. Grotius published his *Introduction to the Jurisprudence of Holland* in 1631, Van Leeuwen his *Commentaries on Roman-Dutch Law* in 1664 ; and Voet's *Commentary on*

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[1] "Les Fondateurs du Droit International" (Paris, 1904) includes appreciations of F. de Vitoria, A. Gentilis, F. Suarez, Grotius, Zouch, Pufendorf, Bynkershoek, Wolf, Wattel and De Martens.

the Pandects was completed in 1704, the year in which Bynkershoek took his seat upon the Bench. After this, apart from Bynkershoek's own published works, there is little literature of general interest until we come to Schorer's *Commentary on Grotius* in 1767, and towards the end of the century Van der Keessel's lectures on the *jus hodiernum* in the University of Leiden, which, however, are only available in manuscript. It is just this gap which the *Observationes Tumultuariae* are able to supply.

It will readily be conceded that Bynkershoek's prohibition of publication could not be sempiternal in its consequence. Whatever be the interest taken in Holland in the study of a system of law, which more than a century ago disappeared from the courts, the interest must be greater in South Africa, where the Roman-Dutch Law (however much modified) still resorts to the old law books of bygone centuries.

Publication of the "Observationes."—The project of publication was welcomed by the Government of the Union, which in 1916 procured from Parliament a subsidy of £1,000 for this purpose, subsequently supplemented. The task of editing this vast material was undertaken by Professors Meijers and De Blecourt of Leiden and Professor Bodenstein, then of Amsterdam. The work remained in abeyance during the war and was revived in 1922, when in a letter addressed to the *Cape Times* Rose Innes C.J. and Kotzé J. pointed out its importance and called for subscribers. Forty subscribers (supplementing the Parliamentary grant) would, it was estimated, ensure the publication of Bynkershoek's part of the work, a hundred subscribers the publication of the whole. "It is proposed," they wrote, "that the reports shall be issued in six volumes each accompanied by a copious digest in Dutch. Each complete volume will comprise about 800 pages. The price has not been definitely fixed, but is estimated at about four guineas per volume."

This project, except, alas, as regards the price, is in course of realization. The first volume, published in 1926, covers the period from 1704 to 1714 and comprises notes of 1,041 cases. The second volume, published in May of this year under the auspices of an enlarged editorial board, carries the record forward to February 1724 and brings the number of reported cases up to 2,017, the numeration being continuous through the two volumes. The editors of this second volume evidently look forward to completing the publication of the whole series of *Observationes*. They acknowledge a further subsidy from the Government of the Union of South Africa. If the material is evenly distributed over the whole period, there should be six more volumes of text, and an enlarged index to the Bynkershoek portion is promised, when this is complete. Unless the rate of production can be accelerated the completion of the whole work will be celebrated by our children or children's children. In their introduction to the first volume the editors mention some other manuscripts of Bynkershoek, still extant, viz. (*a*) *Commentarii juris Hollandici*, (*b*) *Commentarii de jure feudali Hollandico et Zelandico*, and (*c*) *Farragines*, and add: *Summopere ut et illi edantur optant omnes quibus cordi est Juris* *historia.* It is not possible without knowing the character of this material to say how far its publication is feasible or desirable. But it should be noted that Bynkershoek frequently refers in his *Observationes Tumultuariae* to his *Corpus Juris Hollandici et Zelandici,* which, apparently, comprises the three manuscripts above-mentioned. Perhaps the editors will consider the possibility of making public, before proceeding to Pauw's section of the *Observationes,* at least the Commentaries on the Law of Holland. This might very well supply what is so much wanting, a systematic exposition of the Dutch Law of the eighteenth century comparable in method and arrangement to the institutes of Grotius and Van Leeuwen. The *Observationes,* it must be confessed, are much too "tumultuous" for the student who is still at the threshold of his legal studies, by which I mean the student who is taking the usual undergraduate course at a university. As to the practitioner, these volumes supply a rich mine for him to quarry in, if he has time and inclination. But he may perhaps reflect, when counsel on the other side has brought some such treasure to light, that after all the law does not stand still. We know the fate of Lot's wife. *Respiciensque uxor ejus post se versa est in statuam salis.*

I have found occasional but not frequent references to the first published volume of the *Observationes* in the jurisprudence of South Africa.

It will not, I fear, be easy to select from these volumes cases of particular interest to readers of this Journal. Many cases turn upon intricate questions of procedure, others upon the interpretation of wills or antenuptial contracts, a few relate to matters of public or private international law, many to litigation regarding bills of exchange. May I be suffered, in imitation of Bynkershoek, to present tumultuously a few cases which I have noted as possessing a possible interest for English readers who are not primarily students of Roman-Dutch Law? But first it may be appropriate to say a few words about the court whose decisions Bynkershoek has placed on record.

Courts in Holland.—There were two High Courts in the Province of Holland: (1) the Court of Holland (*Hof van Holland*); (2) the Supreme Court (*Hooge Raad*). In Latin texts the first is called *Curia,* the second *Supremus Senatus.*

The Court of Holland was a development of the Council which attended upon the Count, a body exercising functions administrative as well as judicial. During the course of the fifteenth century it became specialized as a Court of Justice. In the second part of this century the Dukes of Burgundy constituted a Supreme Court at Mechlin in Brabant with the special design of withdrawing the French fiefs belonging to Burgundy from the jurisdiction of the Parliament of Paris. The court was also to serve as a Court of Appeal for all the Burgundian Netherlands. It ceased to function when the Northern Provinces declared their independence. It was found impossible for these to agree to the institution of a general

Court of Appeal. The Province of Holland (known as "the Province of Holland and West Friesland," much as we speak of "England and Wales") set up its own Supreme Court in 1582, and five years later the Province of Zeeland submitted to its jurisdiction. The court consisted of a President and nine other judges or councillors, six from Holland, three from Zeeland. There was no understanding as to the selection of the President of the court, and 142 years elapsed before a Zeelander in the person of Bynkershoek occupied this high position. If it had not been for the timely death of Simon Admirael, who had been preferred to Bynkershoek in the previous year, the chance might never have come to him. As it was, the insistence of the States of Zeeland, renewed with double force and aided by Bynkershoek's own hearty canvassing (*si non totus fuissem in ambitu quantocyus ad litteras tuas respondissem*, he writes to Heineccius), secured his appointment.

The Hooge Raad heard appeals from the Court of Holland, besides exercising in possessory actions and other matters an original jurisdiction. It not seldom happened that cases came before it in second or third appeal. To shorten delay and save expense parties would sometimes by agreement go direct to the Supreme Court in first instance, or omitting an intermediate appeal to the Court of Holland. This was called *prorogatio*. Bynkershoek notes, under date December 12, 1714 (*Obs. Tumult.*, II, 1060), that owing to excessive accumulation of business the President moved the court to decline in future to entertain such applications. This was resolved. But the practice continued.

Notes of some Cases brought before the Supreme Court of Holland, Zeeland and West Friesland in the Years 1704–24.—I. *Public International Law.*—There are some cases relating to matters of prize and ambassadorial privilege, but nothing worth recalling.

II. *Private International Law.*—Bynkershoek, following in the steps of his teacher Ulrik Huber, attaches predominant importance to the *lex loci*. This is apparent in the following cases.

(*a*) *Wills—Formalities* (I, 48).—As regards form, in principle the *lex loci celebrationis* governs, but where a will executed in Venice seemed to depart too far from the principles of the *jus commune* the Court refused to give effect to it—wrongly in the opinion of Bynkershoek. A few extracts will serve to illustrate the point at issue and at the same time to convey an impression of the general character of the *Observationes*. After briefly stating the facts, Bynkershoek continues:

> Quaerebatur nunquid valeret id testamentum. . . . Appellatum est ad Senatum Supremum et magnis animis res ibi agitata. Constabat testamentum non esse scriptum manu testatoris, neque ab eo subscriptum, neque etiam praelectum testibus praesentibus. Atque ita sola fides notarii, et Itali quidem, et ex testamento legatarii, videbatur sufficere, et ab ea pendere res tanti momenti. Contra constare videbatur eam testamenti factionem Venetiis valere. . . .
>
> Duo Senatores responderunt pro testamento, ut pote quod valebat

secundum leges Venetorum, ubi conditum et morte confirmatum est. Quatuor Senatores et Praeses pronunciabant contra testamentum, neque illum testandi morem, secundum leges Venetas, satis probari existimabant, neque si probaretur, servandum, corruptelam quippe esse, non legem, ut sola fide notarii testamentum nitatur. Confirmata igitur fuit Curiae sententia et legatarius repulsus 1 Octobr. 1704.

Puto male judicatum, si verum sit, eo etiam modo Venetiis testamenta fieri, neque, ut ille putabat, juris publici esse, ut duo testes probandae veritati adesse debeant, neque corruptelam esse quod fit lege permittente.

Bynkershoek was not a party to the decision, as he had joined the court during the course of the action.

(*b*) *Age of Majority—Conflict of Laws* (I, 71).—The testator, whose will was in issue in the last case, had previously executed certain deeds of gift in Vienna, being then 22 years old, of full age by Austrian law, a minor by the law of Holland, his original domicile. The donee sued the donor's heirs in Holland. The Court, Bynkershoek dissenting, decided against the validity of the deeds. Bynkershoek thought that the question of majority was to be decided by Austrian law. *Dicebam in territorio principis qui morantur ejus esse subditos atque adeo ejus legibus vivere.* He repudiated as absurd the distinction made by the doctors between real and personal statutes in the sense that the personal statute always accompanies the person wherever he may be. It is true that personal qualities accompany the person, those namely impressed by nature, not by law, which has no force outside the territory of the Prince. Bynkershoek does not shrink from the consequence that a person may change from major to minor and back again as often as he crosses a political frontier. He admits a departure from his principle, if a young man has gone abroad *invito patre* to withdraw himself from parental control and also if his father has suffered prejudice. Here no such issue was involved.

(*c*) *Marriage Abroad of Minor—Parental Consent* (I, 230).—The son of an Amsterdam Jew, aged 20, went to England and contracted marriage with an English girl without obtaining the parental consent required by the law of Holland. Years later the validity of the marriage was called in question. Bynkershoek, faithful to his principle that the *lex loci* governs, held that the marriage was valid, because it did not appear that the young man had gone to England *invito patre*, and by English law the marriage was valid since young men come of age *in their twentieth year*, and are free to marry without parental consent. In support of this proposition reference is [incorrectly] made to Cowell, *Inst. Jur. Angl. Lib. I. Tit.* 22, *in pr.* What Cowell says is that guardianship in socage ends when the ward reaches the age of 21.

(*d*) *Marriage at Home—Foreign Majority—Home Minority* (I, 348).—The same principle was applied in the converse case of a promise to marry given by a young man aged 23, established in business in Rotterdam. He had a mother living in Saxony, where (it was said) the age of majority was 21, not, as in Holland, 25. Bynkershoek thought that Dutch law should be applied. *Mihi equidem videtur minorem XXV annis, qui hic uxorem est ducturus ex legibus patriis oportere exhibere consensum parentum, ubicunque tandem vivant.*

(*e*) *English Marriage—Parental Consent* (II, 1121).—This is another case of an English marriage. A young man of noble birth, found guilty of blasphemy and sentenced to banishment and confiscation of goods, betook himself to England, where he contracted marriage, being, as was said, still under age. The validity of the marriage was subsequently called in question. The whole Court pronounced in its favour on the ground that in England minors could contract a valid marriage without parental consent (Cowell, *Lib. I.*, *Tit* 10 *de Nupt.*, sect. 3), and the Dutch law was inapplicable because the young man had gone abroad not voluntarily or with the fraudulent design of getting married without his father's consent, but because he had no alternative.

(*f*) *Letters of Venia aetatis—Extraterritoria lOperation ?* (II, 1523).—Two young men who had obtained *venia aetatis* from the Elector Palatine, *cujus erant subditi*, ceded their rights to an inheritance. Afterwards they sought to obtain *restitutio in integrum* against the cession on the ground of minority. The Court was divided in opinion.

> Quod ad cessiones filiorum, has non subsistere plurimi censebant quod nempe fuissent minores, non obstante venia aetatis, quae extra territorium Principis nihil operaretur. . . . Alii existimabant ubique effectum sortiri veniam aetatis semel recte quaesitam.

This, says Bynkershoek, is so certain that it is no use discussing it.[1]

III. *Commercial Law.*—There are many decisions on bills of exchange which reflect a transitional stage in the theory of negotiability. In one case (II, 1222) Sempronia, who owned some bonds issued by the States General and expressed to be payable to bearer (*aan toonder*), left them with Maevius for the purpose of collecting the interest. Maevius sold them to Titius. Could Sempronia recover the bonds from Titius, the innocent purchaser ? All the members of the Court with the exception of Bynkershoek held that " here in Holland all bonds, whether expressed in an open name (*op een open naam*) or not, can always be revindicated on proof of title." The majority opinion seems to have been influenced by the fact that such bonds were in practice transferred by a special instrument of cession, not by mere delivery. In a later case (II, 1694) the bonds had been pledged by a person to whom they had been entrusted in the same circumstances as above. The Court, Bynkershoek again dissenting, held that they could be recovered from the pledgee. Bynkershoek did not rely upon the principle *mobilia non habere sequelam*, for which he had little affection. He held that the holder of a bill of exchange, endorsed in blank, was the owner and that the endorsement was proof of ownership. The majority opinion was wrong, *sed contra inveteratam opinionem necquicquam disputaveris.*

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[1] But why should *venia aetatis* have an extraterritorial effect denied to majority attained in due course ((*b*) supra) ? It does not appear where the cession was executed.

IV. *The English Royal Family—Claims against the Estate of William III—The Duke of Portland's Will.*—The death of William III, "the King-Stadholder," gave rise to a torrent of litigation, consisting largely in claims by servants and others in respect of wages, salary or pensions. Proceedings were also taken by Queen Anne to recover certain jewels alleged to have been bought with Crown revenue by William or Mary (I, 398, 569). The opinion, or evidence, of eight English counsel was produced along with Norman and English authors, some of them *scriptos ea lingua quam nemo intelligit,* to prove that the jewels in question, being bought with the revenue of the Crown, devolved with the Crown, and did not form part of the personal estate of the late King. Bynkershoek thought that the burden of proof had not been discharged. The Court, however, decided in favour of the Queen. Another much-contested case related to the Duke of Portland's will or wills (for he had executed one in Holland, another in England). He left *tantam pecuniae vim quantam nemo privatus plurimis retro seculis,* and eleven children, five by a Dutch marriage, six by an English marriage, to quarrel over it.

V. *Forum academicum—Privileged Jurisdiction.*—A Leiden undergraduate had the satisfaction of setting by the ears the two High Courts of his native Province (II, 1642). He applied to the University Court for an order on his guardians to consent to his marriage (he being a minor). The guardians obtained from the Court of Holland a writ of prohibition on the ground of incompetence of jurisdiction. The magistrates of the university town then petitioned the States of Holland (the Legislature) to revoke the writ of prohibition, alleging the university statute which gave them a privileged jurisdiction in all suits between students and *citizens.* The Court of Holland, apparently on a reference from the States, reported that the privilege related to proceedings between students and *citizens of the town.* In this case the guardians resided elsewhere. The States did not make any pronouncement. The next step was taken by the lady, who took proceedings before the Court of Holland against the young man and his guardians to have the contract of marriage implemented. Thereupon the university and city authorities, without mentioning the proceedings pending before the Court of Holland, initiated a possessory action before the Supreme Court (*Hooge Raad*), of which Bynkershoek was a member, making the lady and the guardians respondents. They obtained a mandament "to be maintained in the jurisdiction competent to the university" in which they said that they had been "disturbed" by the guardians and the lady. Thereupon the Court of Holland asked for a conference. Bynkershoek and one of his colleagues were appointed *rapporteurs.* Attempts were made to effect a settlement, but without success (II, 1645), nor does the published material tell how the quarrel ended.

VI. *Bench and Bar.*—Suitors sometimes expressed their expectation of favour or sense of gratitude by making small presents to members of the Court. In one case (I, 38) Cornelius Hop reported that he had received a present of a salmon from a citizen of Amsterdam interested in a pending case. The consequence to gift and giver are best told in Bynkershoek's own words :

> Literis, cum quibus salmo missus erat in Senatu lectis, rogata est Hoppii sententia, qui salmonem se remissurum dixit. Senatorum alius existimabat salmonem, si Hopii placeret, aestimari posse et pretium ab Hoppio in pauperes erogari ; modo Amsterodammensem moneret imposterum sibi caveret a mittendis Senatori donis. Et hoc placuit, definito mox, ut fieri potuit, salmonis pretio.

In another case (I, 456) the present was a keg of anchovies (*vasculum cum piscibus minoribus, quos ansjovis vocant*) sent in recognition of trouble taken by a member of the Court in a judicial arbitration. *Quod ubi is Senatui significavit, decretum est remitteret illud vasculum et simul donatorem increparet.* It is fair to assume that in graver matters the judges maintained the purity and dignity of their court.

Advocates were kept in order by reprimands and fines of small amount. The following may serve as typical (I, 207) :

> In ea quam rettuli causa advocati in monitorio juris (= the pleadings) notarant duos senatores, quasi parum recte versatos in re, quae huc pertinebat. Sed indignitas et simul improbitas ejus querelae effecit, ut eo die decretum fuerit, advocati illi per graphiarium serio increpararentur et monerentur in posterum a similibus abstinere et damnarentur hac vice in een ypocras van twee silvere Ducatons (to a fine of two silver ducats = about 10*s*.).

The word *ypocras* calls for explanation. It means " a cordial drink made of wine flavoured with spices, formerly much in vogue " (*N.E.D. sub verbo* Hippocras) ; hence a sconce (in the Oxford sense). The offending advocate was " sconced " one or more silver ducats. (The wine had evidently been commuted into cash.) The amount was paid to the Registrar of the Court and applied in charity. Bynkershoek mentions a case in which :

> Den praesident heeft de ypocrassen, die voor de hand waren, versogt voor iemand, eertijts, zoo hij seide van fatsoen, nu tot armoede vervallen, en die hem om een aalmoes had komen aanspreken, sonder echter iemand te noemen. Dan versekerende dat het wel besteet sou sijn, consensit in id Senatus.

With which " Passage for Unseen Translation " I conclude this article.

THE LAW RELATING TO DEVALUATION OF CURRENCY.

[*Contributed by* RUDOLF GOTTSCHALK, *Dr. Jur., of Gray's Inn, formerly a practising member of the German Bar.*]

WHEN the English courts had to decide in recent years the difficult questions arising out of the devaluation and fluctuation of many European and American currencies they had to master problems for which they did not find great assistance in the decisions of preceding centuries. As Lord Carson observed in *S.S. Celia* v. *S.S. Volturno*,[1] there is very little authority among older decisions until we come to recently decided cases.

In this essay an attempt is made to show the developments of the English law as to devaluation of currency. A survey of the most important foreign laws is added in outline at the end of the article.

Oldest English Decisions.—Probably the oldest English decisions which have bearing on this problem are quoted in the case of " Mixed Money." [2] The judges were of the opinion that the *tempus solutionis* is always decisive and they cite a number of decisions in support.

> After the fall and embasement of money, 5 Ed. 6, debt was brought against the executors of a lessee for years, for rent in arrear for two years, ending Mich. 2, Ed. 6 at which time the shilling (which at the time the action was brought was cried down to 6*d*.) was current for 12*d*. The defendants pleaded a tender of the rent on the days when it became due *in preciis monetae Angliae vocat. shillings, qualibet pecia vocat. shillings adtunc. solubili pro* 12*d*. and that neither the plaintiff nor any other for him was ready to receive it.

It was held that the plaintiff had to take the money " at the rate aforesaid, without costs or damages."

Further on, the judges quoted " the case of pollards," [3] where the defendant was held to be entitled to the payment of the moiety of his debt in " pollards," which was current and offered by him at the time when the debt was due.

In 9 Ed. 4, 49a, it was said that if a man in an action of debt demands £40 it shall be intended money which is current at the time *of the writ purchased.*

The judges quoted a case in the time of Edward I, where an action in debt was brought upon a deed for thirty quarters of barley, price £20 ;

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[1] [1921] 2 A.C., 565.

[2] See Sir John Davies' *Report in English Translation*, Dublin, 1762, p. 73.

[3] 29 Ed. I, reported Dyer 82b.

it was found for the plaintiff and the jury was charged to inquire the price at the time of the payment, and it was said that at the time of the payment a quarter was valued at 12*s*., but at the time of the making of the deed it was only 3*s*., and the plaintiff recovered £18 for the corn according to the price of it at the time of the payment.

All these decisions were the authorities for the judgment in the case of "Mixed Money" itself. Queen Elizabeth in order to pay the royal army caused a great quantity of mixed money to be coined in London and declared by proclamation that after June 10 . . . all other money should be "cried down and annulled and esteemed as bouillon and not as lawful and current money of this Kingdom." Before this proclamation one Brett, of Drogheda, became bound to one Gilbert, in London, in an obligation of £200 on condition that he should pay to his creditor £100 sterling, current and lawful money of England, at the tomb of Earl Strongbow, in Christ Church, Dublin, at a certain day to come, at which day and place Brett made a tender of the £100 in the mixed money of the new standard, in performance of the condition of the obligation, and he was held to be entitled to do so.

Sir William Grant, in *Pilkington* v. *Commissioners for Claims on France*,[1] compares the conclusions drawn by the judges in the case of "Mixed Money" with the opinion of *Vinnius* as to devaluation in Roman Law.[2] "He—Vinnius—takes the distinction, that if between the time of contracting the debt and the time of its payment the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amounts of his debt in debased money; that is, he may pay in debased money, being the current coin, but he must pay so much more as would make it equal to the sum he borrowed; but he says that if the *nominal* value, leaving it unadulterated, were to be increased, as, if they were to make the guinea pass for 30 shillings, the debtor may liberate himself from a debt of £1 10*s*. by paying a guinea, although he had borrowed the guinea, when it was worth but 21 shillings."

Sir William Grant held in Pilkington's case that it was not necessary to consider whether the conclusion drawn by Vinnius or the decision in the case of the "Mixed Money" be the correct one. He was satisfied that there was a wrong act done by the French Government, it therefore being not merely the case of a debtor paying a debt on the day it falls due, "but it is the case of a wrongdoer, who must undo and completely undo, the wrongful act he has done, and if he has received the assignats at the value of 50*d*. he does not make compensation by returning an assignat which is only worth 20*d*.; he must make up the difference between the value of the assignat at different periods."

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[1] (1821) 2 Knapp, P.C. 18.

[2] *Institutionum Imperialium Commentarius Academicus et Forensis*, 1703, Lib. III, Tit. XV, No. 12.

The decision of Sir William Grant differs as well from the case of "Mixed Money" as from the opinion of Vinnius, but it finds support in two cases, referred to in the case of "Mixed Money," as to which the judges remarked, however: "But these latter cases were not resolved." In the first of these cases the facts are as follows: a man received upon marriage £1,000 as a marriage-portion with his wife, paid in silver money, and the marriage was dissolved "*causa precontractus*," so that the portion was to be restored, and it was held that the portion must be restored in equal good silver money, though the State shall have depreciated the currency in the meantime. "So if a man recover £100 damages, he levies that in good silver money, and that judgment is afterwards reversed, by which the party is put to restore all he has received, the judgment creditor could not liberate himself by merely restoring £100 in the debased currency of the time."

We may conclude as follows: (1) The opinion of Vinnius, which is founded on Roman law, was never accepted by the English courts; (2) The oldest decisions held that debts are to be paid in the currency which is legal tender at the *time of payment*, though there are cases reported where payment in debased currency was not permitted; (3) In *Pilkington* v. *Commissioners for Claims on France*, it was laid down that a wrongdoer must *completely* undo the wrongful act he has done.

Damages for Breach of Contract.—In *Scott* v. *Bevan* [1] judgment had been recovered in Jamaica for the sum of £1,554 16*s*. 8*d*. current money of the island of Jamaica, and proceedings were taken in England upon the judgment, the question being whether the judgment should be converted into English currency—£100 sterling being the equivalent of £140 currency of Jamaica—or whether it should be taken at par, and it was decided that it ought to be estimated at the rate of exchange at the time of the judgment in Jamaica, "the real question" not having been considered by the Court, as Lord Buckmaster in *S.S. Celia* v. *S.S. Volturno* [2] observes.

Another case, which also concerns Jamaica, the reasoning of which has often been quoted in different directions since, is *Cash* v. *Kennion*.[3] A debt was contracted in Jamaica and was made payable in London. Held: The expense of commission to the agent of the creditor, who remitted the money, falls upon the creditor. The Lord Chancellor pointed out:

> I cannot bring myself to doubt that where a man agrees to pay £100 in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought *to give him just as much as he would have had, if the contract had been performed.*

This sentence as to contracts sounds very similar to the rule laid down in *Pilkington* v. *Commissioners on Claims against France* for wrongful acts, and we shall see later on that it has been quoted indeed to this effect—and to the contrary.

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[1] 2 B. and Ad. 78.

[2] [1921] 2 A.C. 549.

[3] (1805) 11 Ves. 314.

The judgment was quoted, but the point not elaborately argued, as Lord Buckmaster L.C. observes, in *Bertram* v. *Duhamel*.[1] Judge Story[2] writes: "That a sum in the currency of the country in which the suit is brought (should be awarded), which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par and not by the nominal par of exchange."

The same view is expressed in the American decision, *Marburg* v. *Marburg*,[3] and a similar one also in *Delegal* v. *Naylor*,[4] but the latter decision does not concern really the main question here in issue.[5]

The next case of importance is *Manners* v. *Pearson & Son*.[6] The importance of this case is very clearly explained by Lord Buckmaster in *S.S. Celia* v. *S.S. Volturno*. An action was brought for an account of money due under a contract which provided for payment in Mexican dollars. The judgment declaring the plaintiff to be entitled to an account was delivered on November 4, 1897. The defendant delivered the account on November 13, showing that a balance was due to the plaintiff in Mexican dollars on October 31, 1896. It was held that the right date for the conversion from Mexican dollars into English sterling was the *day of the delivery of the account* (November 13), the latter being the real cause of action (Vaughan Williams L.J. dissented). The majority of the court was of this opinion only on the ground that they held the account to be the true cause of action. Vaughan Williams L.J., however, was of opinion that the correct date would be the date of the breach, *i.e.* the date when the particular claims contracted in the account arose.

The other judges would have been of the same opinion in the case of ordinary contracts—as Lord Buckmaster L.C. observes.

The question in all the decisions mentioned, and in later ones, can be summarized as follows: If a fluctuation of currency occurs in the case of a tort after the wrongful act or in an action for breach of contract after the time of the breach, which is the crucial date for the conversion into English money, the date of the wrongful act or breach—or the date of the judgment?

The question was not finally settled until recent times. Its solution involved a further problem, namely whether the answer given must be identical in cases of contracts and in cases of torts.

Roche J. (as he then was) held in 1919, in *J. A. Kirsch & Co.* v. *Allen Harding & Co.*,[7] in regard to a *breach of contract* that the decisive date ought to be the date of the judgment. In this case the plaintiffs, who were merchants in New York, sold to the defendants in England a quantity of condensed milk for delivery on certain dates in 1918. The defendants committed a breach of contract. It was held that the damages ought to be assessed at such a sum in sterling as would give the plaintiffs the proper compensation in dollars at the rate of exchange prevailing on the date of the judgment.

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[1] (1838) 2 Moo. P.C. 212.

[2] *Conflict of Laws*, p. 1309.

[3] (1866) 26 *Maryland Law Reports*, p. 8.

[4] (1831) 7 Bing 460.

[5] See Lord Sumner in *S.S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 558. See also *Cockerall* v. *Barber*, (1810) 16 Ves. 461.

[6] [1898] 1 Ch. 581.

[7] (1920) 123 L.T.R. 105.

In *Di Fernando* v. *Simon Smith and Co.*,[1] however, the same judge held the time of the breach of the contract to be the decisive date, and he added that he was not satisfied that his judgment was in conflict with his earlier decision, but that if it should be, he preferred his present decision. Bailhache J. in *Barry* v. *Van den Hurk*,[2] and McCardie J. in *Lebeaupin* v. *Crispin*,[3] gave judgments to the same effect and the Court of Appeal affirmed this view in *Di Fernando's* case.[4] The facts in the latter case were that the defendants contracted to carry goods for the plaintiff from England to Italy and to deliver them there on February 10, 1919. In breach of their contract they failed to do so, and converted the goods. In an action by the plaintiff the court fixed the damages at the value of the goods in Italy on February 10—namely 190 lire per 100 lb. The Court of Appeal held that in arriving at the proper equivalent in British currency for the purposes of assessing these damages, the rate of exchange prevailing between the two countries on February 10, 1919, when the breach was committed, and not that prevailing at the date of the judgment, should be adopted. Scrutton L.J. pointed out [5] that when a plaintiff claims damages for breach of contract to deliver goods in a foreign country at a fixed date, the measure of damages is, if there is a market, the market value of those goods at the place where and on the day when they should have been delivered. His Lordship held it to be immaterial to prove that at the date of the judgment awarding the damages the goods were either worth more or worth less than they were at the date of the judgment, the reason for excluding this evidence being that subsequent fluctuations in the value of the goods which ought to have been delivered were too remote a consequence of the original breach to be taken into account by the court. The court having no power to award damages in a foreign currency, it must " translate " into English currency the figure arrived at as the damages in foreign currency at the date of the breach. Just as the court had to exclude from the calculation of the damages the subsequent change of the value of the goods after the date of breach, so also it had to exclude the subsequent change in the value of the currency, and for the same reason, namely, as being too remote a consequence of the breach to be taken into consideration by the court.

This decision overruled that of Acton J. in *Cohn* v. *Boulken*,[6] in which the day of the trial had been fixed as the decisive date.

The decisions of Rowlatt J. in *Uehlendahl* v. *Pankhurst*,[7] and of Bailhache J. in *Peyrae* v. *Wilkinson*,[8] follow that in the *Di Fernando's* case.

They followed also the important decision of the Court of Appeal in

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[1] [1920] 2 K.B. 704.
[2] [1920] 2 K.B. 709.
[3] [1920] 2 K.B. 714.
[4] [1920] 3 K.B. 409.
[5] *Loc. cit.*, p. 414.
[6] (1920) 36 T.L.R. 767.
[7] (1923) 39 T.L.R. 628.
[8] [1924] 2 K.B. 167.

Société des Hôtels Le Touquet Paris-Plage v. *Cummings.*[1] There the defendant, an English lady, contracted in 1914, in France, a debt to the plaintiffs of Frs. 18,035, undertook to pay that sum to them in France before the end of that year, but failed to do so. In November 1919, by which date the value of the French franc as expressed in English currency had heavily fallen, the plaintiffs commenced an action against her in England on a specially indorsed writ claiming the amount in sterling which would have been the equivalent of Frs. 18,035 at the end of the year 1914. While the action was pending the defendant went to France and paid in French money to the then hotel manager of the plaintiffs the sum of Frs. 18,035. The manager, who did not know the amount of the defendant's debt nor that an action had begun, did not when taking the money intend to accept it in full satisfaction. It was held that the debt, being payable in France in French currency, did not cease to be a French debt by reason of its being sued for in England, and as, if the action had been brought in France the payment made would have been a good discharge of the debt notwithstanding the depreciation of the French franc the payment must be a good discharge.

As to this judgment it has to be observed: (1) Scrutton L.J. realized that the decision might be thought to conflict with the judgment in *Pilkington* v. *Commissioners for Claims on France*[2] dealt with above. His Lordship distinguished the two cases on the ground that in the latter case an English claimant desired compensation from English courts for a wrong done to him in France, "and as personal property follows the domicile it may be that he was entitled to such an amount in English money as represented the value to him in England of the property confiscated at the time of confiscation," while in the present case a domiciled Frenchman desired damages for non-payment to him on the date due of a debt payable in France in French currency. (2) Atkin L.J. reserved the question, what might be the position when a foreign creditor to whom a debt is due in his country in the currency of his country comes to sue his debtor in the English courts for the foreign debts. To this question P. O. Lawrence J. gave the answer in *In re British American Continental Bank Ltd.; Crédit Général Liégeois's Claim.*[3] He held that in this case also the proper date for the conversion into English money is the date when the debt became due abroad.

In this decision and particularly in *In re British American Continental Bank Limited; Goldziehers and Penso's Claim,*[4] it was laid down that the rule in the *Di Fernando's* case is not dependent on the form of procedure and applies to a claim in a winding up.

The principle is applied in *In re British American Continental Bank Ltd.; Lissa and Rosenkrans's Claim,*[5] where the applicants—a German bank—had to receive from the respondent specific amounts of American dollars and English pounds sterling. When the respondent failed to supply the dollars and sterling, the applicants purchased them and paid therefor German marks at the market price ruling on that day. After a compulsory winding up of the bank of the respondent had taken place the liquidator purchased the same number of marks as the applicants had expended in acquiring the undelivered currencies and tendered that sum of marks to the applicants in full satisfaction of their claim, which tender was refused.

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[1] [1922] 1 K.B. 451.
[2] (1821) 2 Knapp, P.C. 7.
[3] [1922] 2 Ch. 589.
[4] [1922] 2 Ch. 575.
[5] [1923] 1 Ch. 276.

It was held that the claim was for damages for breach of a contract to deliver American dollars and English sterling and not for a debt in German marks, and that on the authority of *Goldzieher and Penso's* case the applicants were entitled to be admitted as creditors in the winding up for the value of the marks at the rate of exchange at the date of the breach and were not bound to accept the tender of the marks made by the liquidator.

Damages for Tort.—The last-mentioned decisions are based on the leading judgments of the House of Lords in *S.S. Celia* v. *S.S. Volturno.*[1] In an action arising out of a collision between an English ship and an Italian ship both ships were held to blame and the cross-claims for damages were agreed, subject to a question raised by the owners of the Italian ship as to the rate of exchange in respect of a claim calculated in Italian lire for detention during the period that the ship was undergoing repairs. It was held by Lord Buckmaster, Lord Sumner, Lord Parmoor and Lord Wrenbury, Lord Carson dissenting, that the proper date for ascertaining the rate of exchange for the purpose of converting the amount payable into English currency was the date on which the detention occurred.

Here at last we find in regard to claims for damages arising out of a tortious act, the date for conversion into English currency treated as the same as in the case of breach of contracts. This seems to be in conflict with the decision of Sir William Grant in *Pilkington's* case,[2] with which we dealt above. Lord Sumner and Lord Parmoor quote this case to support their judgment. But it may respectfully be submitted that it gives support only in regard to the date in actions for tort, but not in principle. While the House of Lords in the *Volturno* case gave judgment to the effect that in tort and breach of contract equally the date is decisive when the cause of action originated, Sir William Grant pointed out in the *Pilkington* case: " We think there is no analogy to the case of creditor and debtor."

The decision in *Cash* v. *Vennion* [3] does not afford real assistance. For the words that the creditor shall receive " just as much as he would have had, if the contract had been performed " could be quoted by either side and are cited indeed as well by Lord Parmoor in support of, as by Lord Carson against, the judgments of the majority of the Lords.

But in principle there seems to be no reason to treat differently actions arising out of contract and actions arising out of tort, as Sir William Grant proposed to do. The decision of the House of Lords finds real support in various decisions, mentioned above. The result is as Younger L.J. resumes it *In re Chesterman's Trusts* [1]:

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[1] [1921] 2 A.C. 544.

[2] 2 Knapp 7.

[3] (1805) 11 Ves. 314.

> It has now been definitely decided that certainly in cases both of damages for breach of contract and of damages for tort, the translation must be effected as at the date of the breach or of the wrong.[2]

Risk of Devaluation to be borne by Creditor.—In the later decisions the question as to the decisive date is no longer in dispute, but the further question is raised as to whether the creditor must bear the risk when in consequence of fluctuation of currency the value of money is depreciated. This question, which is the decisive one for the entire problem, has been answered in different ways by different systems of law, as we shall see later.

Although at the moment we are concerned only with English law, it seems important to investigate the problem in principle. There is the essential question, What is money ? Does it represent the value of the metal it is made of—or is it only a creation of the law of the State—*ein Geschoepf der Rechtsordnung* as Knapp expressed it, the existence, conditions and form of which derive from the State only and from nothing else, its value being decreed compulsorily by the State ?

We are of opinion that Knapp's theory is the sound and true foundation of the existing systems of currency. From this point of view the answer to our question in principle seems clear : The State being almighty and exclusively decisive as well in regard to the depreciation of money as to the question what is legal tender, the creditor, in the absence of statutory enactments to the contrary, has in principle to bear the risk of devaluation of money. This answer, theoretically correct, has been adopted in practice by the English courts, which have preferred to follow the hard and fast rules *stricti juris* rather than by equitable rules to undermine the safety and continuance of the jurisdiction in order to avoid economic "injustice" in the particular case. So far we agree with the course followed by the English courts in spite of its sometimes economically regrettable results, for it is the duty of the legislature and not of the courts to give relief by altering the law. The judicature has to administer the existing law and nothing else. The German courts have gone farther only on the ground that the legislature has steadily failed to give the relief needed to avoid the gravest economical hardship—this being, however, *in stricto jure* no justification.

The first English decision to be noted is *British Bank for Foreign Trade Ltd.* v. *Russian Commercial and Industrial Bank.*[3] In this case the plaintiffs, a British bank, obtained from the defendants, a Russian bank, on the security of certain bonds, a loan of 750,000 Russian roubles, in

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[1] [1923] 2 Ch. 490.

[2] See also *Ottoman Bank* v. *Chakarian,* [1930] A.C. 277.

[3] 38 T.L.R., p. 65. Cf. also *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade,* [1921] 2 A.C. 438.

June 1914, when the currency was based on the gold rouble. At that time 750,000 Russian roubles represented £78,206, but subsequently they became almost valueless owing to the issue of paper currency not covered by gold. In an action for redemption it was held that the loan was repayable in paper roubles issued by the authority of the Russian Government and in use at the material date, and that upon payment of the principal and interest in roubles and of the costs in English money the plaintiffs were entitled to redemption.

Of the various defences it is only the last one dealt with by Russell J. which is of importance for our problem. The defendants said that the plaintiffs in a redemption action sought equitable relief, and must act equitably. But as Russell J. pointed out, the plaintiff in a redemption action was entitled to redeem if he fulfilled his contract and repaid the money advanced with interest and costs. There was no authority that because the mortgage-contract from unexpected causes was alleged to operate harshly on the mortgagee the court could refuse redemption or vary the terms on which it would be granted. In the case of a loan of paper roubles the risk of depreciation or the benefit of appreciation lay with the lender. The defendants were seeking to throw the risk of fluctuation upon the mortgagors, and if the judge acceded to their suggestion he would in effect have changed the loan from a paper rouble loan to a sterling loan.

This decision has been approved in *In re Chesterman's Trusts*.[1] In that case certain sums of German Reichsmark had to be converted into English currency. At the date of the execution of the mortgages in question the creditors could under German law have insisted on payment in gold, but by a German Imperial statute of August 4, 1914, it was provided that Imperial Treasury notes should be legal tender and that any agreements made before July 31, 1914, for the payment of any debt in gold should, until further order, not be binding on the debtor. No further order had been made. Russell J. and the Court of Appeal held that the loans were loans of foreign money involving on the one side an obligation to pay and on the other side an obligation to accept payment in whatever at the date of repayment was legal tender and legal currency in the foreign country whose money was lent, and that the covenants to pay specified sums in Reichsmark were satisfied under the German law now in force by the payment in Treasury notes of sums so specified.

The appellants objected to the order appealed from on two grounds. In the first place, they made the same objection as in *The British Bank for Foreign Trade* case,[2] namely, that on the construction of each of the deeds in question the sum of German Reichsmark thereby was payable in gold only. As to this objection the appellants failed on the same grounds as in the earlier decision.

In the second place the appellants contended that their claim being in law a claim for damages for breach of contract, the proper date for making

[1] [1923] 2 Ch. 466.

[2] 38 T.L.R., p. 65.

the conversion was that of the breach, *i.e.* when the principal and each payment of interest respectively became due.

This objection failed because in the case in question there was no claim arising out of a breach of contract, and damages were to be compensated by payments of interest. But apart from these special circumstances, which prevented the application of the principle in the case in question, Lord Sterndale M.R. and Warrington L.J. held the principle contended for to be correct, so that there is a way of meeting economically regrettable results to some extent,[1] where the conversion in English currency takes place at the date of the breach of contract or in torts at the date of the commitment of the wrongful act. Younger L.J. applied this principle in his dissenting judgment even to the present case, and his Lordship investigated the question what the parties intended, and emphasized that they never contemplated that repayment would or could be validly made under the deed otherwise than in gold, but that these facts were not sufficient to make the debt payable only in gold.

Difference between English and German Law.—The decision *In re Chesterman's Trusts* was applied in *Anderson* v. *Equitable Life Assurance Society of the United States*.[2] The importance of this decision is that the English courts did not alter their view, although the German law had changed fundamentally in the meantime and although the plaintiff would have succeeded if German law would have been applicable.

Moreover, Acton J., who gave a judgment in favour of the plaintiff, which was reversed by the Court of Appeal, was of opinion that the change which had taken place in German law did not entitle the plaintiff to recover more than paper marks.

The facts were as follows: In 1887 the defendants, an insurance company, issued a semi-tontine life policy on the life of the plaintiff's husband, by which, in consideration of the payment in London of an initial premium of 2,149.80 Reichsmark and thereafter quarterly payments of 570 Reichsmark for twenty years, the defendants promised to pay 60,000 Reichsmark on the death of the plaintiff's husband. The policy became fully paid in 1907, and as from that date there were certain profit-sharing rights. The plaintiff's husband died in 1922 and the policy-money became payable in England in sterling. The plaintiff claimed to be entitled to payment on the basis of gold marks. The defendants claimed to be entitled to pay the amount of the policy and accrued profits at the rate of exchange prevailing for Reichsmarks when the payment became due. In the defendants' accounts the calculation of shares of profits had been made throughout on the basis of a continuous uniformity in the exchange value of the Reichsmark.

It was held by the Court of Appeal that as the contract did not refer to gold marks, but only to Reichsmarks as a token of exchange, its true construction was that the defendants undertook to pay in their office in

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[1] See pp. 484, 497 of the Report.

[2] 42 T.L.R., pp. 123, 302; 134 L.T. 557.

England a sum in sterling at the rate of exchange applicable to the German Reichsmark on the date of payment.

Bankes L.J. pointed out that the case was governed by *In re Chesterman's Trusts.* Dealing with a reference which had been made to a subsequent decision of a court at Leipzig by which it was decided that the mark was no longer legal tender, he held that that decision and the law as there declared were immaterial because the true interpretation thereof was that it did not affect the currency. What it did effect was to rip up the transaction and say that so far as the amount was concerned it should no longer be the contract amount. The contention founded on that decision failed, as it had no bearing on the question which the court had to decide.

It seems doubtful whether this view is in accordance with the opinion of the German Reichsgericht, which has repeatedly declared that the true position is that payment in extremely depreciated paper marks is not a discharge of the obligation, but only a part payment, since the tender of these paper marks is not a legal tender in spite of the German Imperial statute of August 4, 1914.[1]

The Lord Justices of the Court of Appeal were not prepared to share this view, which was obviously in their opinion *ultra vires*, because the courts are unable *in stricto jure* to alter statute law. Consequently, they gave " a true interpretation " which differs from the opinion of the German court. The opinion of the English courts has, however, the advantage of being in strict accord with the fundamental principles of the law.

In *Franklin* v. *Westminster Bank,* Mackinnon J. dismissed the action of the plaintiff as fantastic and ridiculous. The plaintiff had bought German marks to the nominal value of 9,000,000,000 on December 15, 1926, for £15 and sued the bank for payment at the rate of exchange on the date of the issue or alternatively at the rate of the date of the issue of the writ, namely £450,000,000.[2]

The decision of the Privy Council in *Assicurazioni Generali* v. *Selim Cotran*[3] depended entirely on the construction of the text of the Treaty of Lausanne and has no bearing on our problem.

The Gold Clause.—How difficult the questions of construction are even when the word " gold " has been used in the text of a contract is shown by the decision in *Feist* v. *Société Intercommunale Belge d'Electricité.*[4] One F. was the holder of a bond for 100 L., one of a series of bonds issued in 1928 by a Belgian company. Each bond provided for payment of £100 on September 1, 1963, or at an earlier date in accordance with indorsed conditions, and of interest during the continuance of the security at the rate of 5½ per cent. per annum " in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the first day of September, 1928."

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[1] Cf. decisions of the German Reichsgericht, vol. 109, p. 112 ; vol. 111, p. 63 ; and *Commentary of Judges of the German Reichsgericht,* § 242 B.G.B. 4.d.

[2] Referred to by Minty, *Banking and Foreign Exchange Supplement,* 1931–2, p. 16.

[3] [1932] A.C. 268.

[4] [1933] 1 Ch. 684 and [1934] A.C., p. 161.

One of the indorsed conditions provided that the bond should be construed and the rights of the parties regulated according to the law of England as a contract made and according to the terms thereof to be performed in England.

A half-yearly instalment of interest on the bond having fallen due the company claimed to pay the nominal sum specified in the coupon in whatever might be legal tender in England at the day of payment in full discharge of their obligation under the bond. Upon an originating summons the plaintiff claimed such a sum in sterling as would purchase in the market on the day of payment gold of the weight and fineness contained in the gold coin of the United Kingdom sufficient to discharge the payment if falling due on September 1, 1928.

Farwell J. and the Court of Appeal [1] held on the construction of the bond and its conditions, that the bond imposed on the defendants merely an obligation to pay a sum of money which might be discharged by offering legal tender for that sum.

The House of Lords reversed these decisions. Lord Russell of Killowen, in explaining the difficulty of construction, pointed out : " If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them, or ought I, if I can discover it from the document, to attribute some other meaning to them ? " [2] His Lordship adopted the latter course and was guided by the consideration and principles which have been laid down by the Permanent Court of International Justice in the case of the *Serbian Loans*.[3]

> As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definitive use of the word " gold " cannot be ignored, the question is : What must be deemed to be the significance of that expression ? It is conceded that it was the intention of the parties to guard against the fluctuations of the Serbian dinar, and that in order to procure the loans it was necessary to contract in foreign money. But in so contracting the parties were not content to use simply the word franc, or to contract for payment in French francs, but stipulated for " gold francs." It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be not to continue but to destroy it.[4]

The decision of the House of Lords is to be distinctly approved, since it construes the contract in accordance with the intention of the parties at the time when the contract was made.

Survey of English and Foreign Laws.—It will be convenient to give in conclusion a survey of the positions which English law and foreign laws hold in regard to devaluation of currencies.

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[1] [1933] 1 Ch. 684.

[2] See p. 22 of the Report in [1934] A.C.

[3] Series A, Nos. 14–21, *Collection of Judgments*, 1928–1929, " Judgment No. 14," p. 32.

[4] Cf. also the " Case of the Brazilian Loans, l.c., No. 15.

In English law it is settled now: (1) if a foreign currency has to be converted into English money the decisive date is, for claims arising out of a breach of contract or out of tort, the date of the breach or the date at which the tort was committed; (2) apart from this, English law has no regard for fluctuation and depreciation of currencies. The creditor has to bear the risk of depreciation of currency; (3) where the gold clause is contained in a contract the English courts will give effect to it as far as possible.

German law has regard to fluctuations of currency, if they are of such a nature that they ought to be considered in consequence of § 242 *Buergerlichen Gesetzbuches.*[1] For full particulars see the Commentaries of Muegel or Schlegelberger or Quassowski on the *Aufwertungsrecht.*

Swiss courts have repeatedly given judgments in which the principles of the German *Aufwertungsrecht* have been recognized. Sobernheim[2] refers, however, to a judgment of the Supreme Court of Switzerland (*Bundesgericht*) refusing to apply the principles of German law to Swiss insurance companies, which had not suffered heavy loss by the inflation of the German currency and were therefore able to fulfil their obligation.

As to French law we have stated already that French law has no regard for fluctuations of its own currency, that it even prevents agreements for payment in foreign currency, except debts which have to be fulfilled by foreigners in France, or have to be fulfilled abroad.

The Danish and Czecho-Slovakian courts have refused to apply the principles of the German *Aufwertungsrecht* in a manner similar to that of the English courts.[3]

The Italian, Dutch and Scandinavian courts have in regard to their own currencies no consideration for fluctuation, while they take into account fluctuation of foreign currencies, if a breach of contract occurs.

The Hungarian Supreme Court, which was at first reluctant, admitted by a decision of June 13, 1925, the application of equitable principles similar to the German law, but excluded therefrom, to a large extent, claims for repayment of loans. In 1928 a statute was enacted to the same effect.

The courts of Yugoslavia and Rumania refuse to consider fluctuations with certain exceptions.

Soviet-Russia took no account of depreciation of currency, but has arrived ultimately at principles similar to the German system, claims against the Government and its institutions, however, being exempted.

While German and Swiss law award damages arising out of a delay in paying a debt, English, French and Dutch laws refuse this—English law, because the damage is held to be too remote as arising exclusively out of the financial transactions of states. Italian, Belgian, Austrian laws admit these damages in certain cases.

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[1] See *supra*, p. 57, n. 1.

[2] *Rechtsvergleichendes Handwörterbuch*, III, pp. 660 *seq.*

[3] Cf. with those and with all the following heads, Sobernheim, *Rechtsvergleichendes Handwörterbuch*, III, pp. 660 *et seq.*, p. 666, with whose clear and elaborate statements we mostly concur.

In English law judgment has to be given in English currency even though a debt was expressed in foreign currency, and the question as to the decisive date for the conversion arises. Sobernheim [1] points out that most laws at present regard as decisive the date of payment as being the most favourable for the plaintiff, while English and American laws, however, regard the day of the judgment as decisive. This latter view is, it may be submitted, not a correct statement of the law. While it might be true for American law on the authority of *Marburg* v. *Marburg*,[2] there is the long current of authority which lays down that for English law not the date of the judgment but the date of the breach of the contract or of the commission of the tortious act is the decisive date.

As regards the gold clause see *supra*. The introduction of such clause is admitted even in France in so far as a debt has to be fulfilled by foreigners in France or has to be fulfilled abroad.

[1] *Loc. cit.*

[2] 26 *Maryland Law Reports*, p. 8.

MEASURE OF DAMAGES IN THE FRENCH LAW OF CONTRACT.[1]

[*Contributed by* Professor René David, *University of Grenoble.*]

The scope of the present essay is not to determine whether and when damages are due in contract. We shall therefore not examine the very troublesome question of the relations between responsibility in contract and responsibility in tort ; nor shall we examine to what extent and in what circumstances a party is entitled to damages and may claim damages instead of insisting on the execution of the contract and demanding specific performance thereof. But supposing a liability has been incurred in contract and damages are due, then the further question will arise as to how the measure of these damages is to be fixed and what are the guiding principles regarding their evaluation.

The problem, how the measure of damages in contract is to be ascertained, is dealt with in various provisions of the Civil Code and specially in Arts. 1149 to 1153.

The basic principle is found in Art. 1149, which reads as follows :

> Damages due to a creditor shall, as a rule, be equal to the loss he has sustained and to the profit he has been deprived of, subject to the exceptions and modifications hereafter.

The rule of Art. 1149 is therefore to be considered first of all in itself, as it usually works in normal cases. Next, we shall have to consider how the rule is qualified by later Articles (1150, 1151), which are concerned, broadly speaking, with the distinction between general and special damages and with the question of the remoteness of damage. Finally we shall have to deal with the exceptions to the rule (Arts. 1152, 1153), which relate to cases where a penalty clause has been stipulated by the parties in their agreement or where the damage suffered by the creditor is conclusively presumed and evaluated by the law.

Special attention must be paid of course to the decisions of the French courts, as well as to the opinions of French text-book writers ; and wherever it has been possible, the facts of the cases are set out, in order to give a more complete view of the matter. But this has not been always possible, as in many cases nothing but the " motives " of a decision are to be found in the French reports, and the facts which underlie them are not set out.

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[1] *Abbreviations.*—D.P. (*Recueil périodique et critique Dalloz*) ; D.H. (*Recueil hebdomadaire de jurisprudence Dalloz*) ; S. (*Recueil général des lois et arrêts Sirey*) ; Civ. (Civil Chamber of the Court of Cassation) ; Req. (Requêtes Chamber of the Court of Cassation) ; name of town (Court of Appeal sitting in that town).

The Rule of Art. 1149.—According to the principle laid down in Art. 1149, damages for the non-performance or for delay in the performance of a contractual obligation include two elements, that is, the actual loss of the creditor and the profit he has been deprived of. Damages are to be equal to the sum of these two items, which French lawyers, following the tradition, usually call *damnum emergens* and *lucrum cessans*.

There was a further rule in the old French law, as stated by Pothier, that damages should be taxed by the courts " with a certain moderation," except in the case of fraud on the part of the debtor. But an article, which embodied this rule in the first draft of the Civil Code, was dropped in the course of the discussion of this code. That is, however, worth mentioning, since it seems that this traditional rule is still maintained by the French courts, which always incline to be very lenient towards a debtor when he has committed no fraud.

It is the duty of the inferior courts to determine as a matter of fact what is the amount corresponding to those two elements, and the Court of Cassation has no power to increase or reduce that sum. But it is the duty of the Court of Cassation to examine whether a decision has taken into consideration all the damages and nothing but the damages that the law requires.

The creditor has to show the nature and extent of the damage which has been inflicted upon him by the failure of the debtor duly to perform his obligations under the contract. Damages will only be awarded in the case of an actual loss, and the mere possibility of a loss will be immaterial. If the violation of a contractual obligation has inflicted no damage on the creditor no judgment will be given against the debtor.

This rule has been made clear by a decision of the Court of Cassation in which it was laid down that : " As a rule mere delay, which imports no loss to the creditor is not a cause for an award of damages against the debtor." [1] In another case a solicitor (*avoué*) had negligently omitted to have the name of his client included in the list of creditors upon the distribution of the price of sale of a certain estate, and the client sued him for damages ; but the court admitted a plea that no loss had been suffered by the client owing to the solicitor's breach of contract, evidence having been given that the estate was subject to several mortgages (*hypothèques*) and that even if the client had been included in the list, he would also have taken no share on the distribution of the price.[2]

Nor will it be sufficient that there is the mere possibility of a loss. An illustration of this rule is given by the following case.[3] A machine of a new type had been damaged in course of transport, and the plaintiff had, therefore, been unable to fulfil his obligations under an existing contract; it was held that he was entitled to damages for the loss of that bargain. But he also claimed damages on the ground that, had the adjoining owners of the land where the work was to be carried on remarked the way in which it could be performed with this new machine, they also would have entered into contracts with him. It was held that the inferior court had been wrong in admitting such a cause of damages: "it was moreover not proved that, had the experiments been carried out with success, such orders would have been made."

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[1] Civ., March 5, 1913, D.P. 1914, 1. 61.

[2] Civ., November 26, 1890, S. 1891, 1. 72 ; D.P. 1891, 1. 18.

[3] Civ., March 3, 1897, S. 1897, 1. 411 ; D.P. 1898, 1. 118.

In another case a train had been delayed, and one of the passengers sued the railway company and claimed damages on the ground that as a consequence of the delay he had been unable to take part and to win in horse-races in which he was engaged as a competitor. The Commercial Court of Limoges had given him damages on this ground, but the Court of Cassation reversed that decision and held that he was not entitled to more than his railway and hotel expenses.[1]

It is noticeable that those two decisions purport to be based, not on the absence of an actual loss, but on Arts. 1150 (both decisions) and 1151 (first decision) of the Civil Code, that is to say, on the circumstance that the supposed loss of the creditor was of such a nature that no compensation was due from the defaulting debtor. This is an illustration of the tendency of the courts, of which other examples will be given.

In opposition to the case of an uncertain loss, which gives rise to no damages, the case of a future but actual loss will be taken into consideration by the courts. The court may, for instance, compel the debtor to pay a certain given sum for every breach he commits of a given obligation; that should, however, be done only in the case where the loss arising from such a violation is already ascertainable. This will not be the case, for example, if the obligation is to the effect that a man is under a duty to close a barrier after exercising his right of way on the premises of the plaintiff.[2]

An interesting practice of the courts on this point calls for examination. The courts have decided that in the case of the breach of a contractual obligation, they have the power to award to the creditor, not a definite sum of money, but a sum to be calculated for every day the debtor delays the performance of his contractual duty. Where, for instance, an electric light company cuts off the light of one of their clients, a hotel, the courts will order them to pay to their client 100 or even 10,000 francs per day until they supply electricity again in accordance with their contract.[3] Where a seller of land refuses to sign a conveyance in breach of a contract, he may be ordered to pay 100 francs a day as long as he continues to break the contract.[4]

This practice of the courts does not seem to conflict with any provision of the law, provided only that the damages awarded by the court strictly correspond with the loss inflicted upon the creditor by the breach, and provided that the decision of the court makes mention of this and is not made subject to a revision.[1] But in most cases a decision to this effect is of an entirely different nature: it takes no account of the actual loss of the creditor, but only purports to compel the debtor to perform the contract by threatening him with ruin if he does not; in such case it is admitted that the decision can be revised by the court. The practice, which is known as *théorie des astreintes*, is very difficult to justify from a theoretical point of view. It provides an efficient means of enforcing specific performance of obligations to do or not to do something, but in any case it ceases to be connected with the question of the measure of damages, and we must therefore leave it aside.

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[1] Civ., January 29, 1908, D.P. 1910, 1. 280.

[2] Req., March 15, 1892, S. 1892, 1. 309. Note that the case is not one of contract.

[3] Req., December 1, 1897, S. 1899, 1. 174; D.P. 1898, 1. 289.

[4] Req., November 18, 1907, S. 1913, 1. 386.

A further question is whether the courts are allowed to take into consideration, in a case of contract, an intellectual or moral damage. Some decisions are said to have refused to consider such damages, as for instance a decision of the Court of Cassation [2] in a case where the defendant, in breach of a contract, had refused to deliver to the plaintiff various family portraits without any commercial value. But in an earlier case in 1865 a court considered that the refusal by an artist to deliver a picture did entitle the other party to an indemnity, as it caused him a damage which was "not only moral but material and important." Since the date of these decisions, on the other hand, compensation for moral damage has been more readily awarded by the courts in cases in tort, and legal writers claim that there is no reason whatever for a distinction in this matter between contract and tort; the contrary solution would have in particular the unexpected consequence that it would be to the disadvantage of an injured passenger that his action against the carrier is an action in contract and not in tort. It is therefore most probable that French courts would not nowadays maintain the principle of their old decisions and that, contrary to the English rule, but in accordance with the prevailing solution in tort and with the opinions of text-book writers, they would at present take into consideration moral damage arising out of a breach of contract. Another reason which makes this more probable is that the courts have used the remedy of the *astreintes* to ensure the performance of duties of a non-material character, such as the obligation of a woman to take her children to her husband,[3] or even the obligation of a wife to live with her husband.[4]

The damage caused by the breach, according to the *doctrine*, must be estimated as at the time when the breach occurs. However, what is meant thereby is not clear, and it would seem to be more in accordance with Art. 1149 to assert the contrary proposition, namely, that the damage must be estimated by the judge as it appears to be at the time of the judgment,[1] this being the best time for appreciating the measure of the actual loss inflicted. The commonly asserted rule to the contrary seems therefore to be due to a confusion, and to assert no more than that the judge cannot take into consideration a damage which is not a direct and immediate consequence of the breach committed. This, however, is a rule resulting from one of the qualifications of Art. 1149 that we are now about to study.

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[1] Bruxelles, March 1, 1909, S. 1909, 4. 15.

[2] Req., February 17, 1894, S. 1874, 1. 497; D.P. 1874, 1. 360.

[3] Civ., March 18, 1878, S. 1878, 1. 193.

[4] Req., June 26, 1878, D.P. 1879, 1. 80. Lyons, February 24, 1909, D.P. 1910, 2. 172.

The Qualifications to Art. 1149.—The rule of Art. 1149 of the Civil Code is doubly qualified by the following articles. Damages are only due to the creditor for a loss or for a failure of profit when such loss or failure of profit had been foreseen or could have been foreseen at the time of the contract (Art. 1150), and when they are a direct and immediate consequence of the breach (Art. 1151). The first of these qualifications (but not the second) will be defeated in the case of fraud (*dol*) by the debtor.

It would seem at first sight that Arts. 1150 and 1151 correspond with what is known in English law as special damage and remoteness of damage, and such was indeed most probably the meaning of these Articles according to the authors of the Civil Code, who had followed on the point the opinions of Pothier.[2] But in the practice of the courts this distinction has unhappily not been maintained, and Art. 1150 has been construed in such a way as to cover, not only the cases for which it was properly meant, but also the cases which were actually within the scope of Art. 1151. Two different questions have thus been mixed up, which ought to have been kept distinct in sound theory, as is proved by the fact that they are treated differently by the Code itself in the particular case of *dol* on the part of the debtor.

Open to criticism as that practice may be, Art. 1151 is less and less resorted to nowadays, or rather it tends to appear as a mere qualification of Art. 1150. The notion of remoteness of damages is therefore perhaps still more confused and uncertain in French law than in English law. It is true that that uncertainty is apparently of less importance in French law than in English law, as French judges are not technically bound by any judicial precedent and as it is enough for an inferior court in every case to say that the alleged damage is too remote in order that there may be no appeal from their decision.

Text-book writers in France do not discuss the notion of remoteness of damages, which is regarded by them as being a pure question of fact. They merely recall on this point a classical example given by Pothier of a cow which had communicated an infectious disease to the cattle of her purchaser, for which reason the latter had been unable to cultivate his farm, been adjudicated bankrupt and suffered a great damage from the ensuing sale of his property.[3]

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[1] Req., May 21, 1928, S. 1928, 1. 239; D.H. 1928, 366.

[2] *Œuvres complètes*, edited by Bugnet, vol. 2, pp. 76 ff.

[3] *Pothier*, vol. 2, p. 80.

French reports do not show any case in which Art. 1151 has been resorted to alone, independently of Art. 1150. It is, however, useful to refer here to a decision of the Court of Cassation,[1] in which Art. 1151 might perhaps have been usefully invoked. In that case a debtor had not paid his creditor, the plaintiff, punctually, and he was therefore sued for damages. The creditor alleged that, as a consequence of the non-payment, he had been adjudicated bankrupt, and that his property had been subsequently sold in a very bad market and at a very low price. The court took into consideration all these circumstances and awarded him as damages the difference between the actual value of his property and the price for which it had been sold at the auction. No objection grounded on Art. 1151 seems to have been raised by the debtor. It is nevertheless interesting to compare this case with the classical illustration of the remoteness of damages by Pothier, and also for English lawyers to compare it with the decision of the House of Lords in the well-known case of *Owners of Dredger Liesbosch* v. *Owners of S.S. Edison*.[2]

As a rule Art. 1151 will be resorted to and applied concurrently with Art. 1150, which covers a great part, if not the whole, of its scope. Art. 1150 reads as follows :

> A debtor shall be liable for damages only when such damages have been or could have been foreseen at the time of the contract, unless it is by reason of his fraud (*dol*) that the obligation has not been performed.

It is generally agreed that the word *dol*, as it is used in this article, must not be understood in the same sense as the same word in Art. 1116 of the Civil Code. The word *dol* in Art. 1150 does not imply any "fraudulent contrivances" of the debtor, as is the case in Art. 1116. It only connotes the absence of good faith or the fault of a debtor, who would have been in a position to perform the contract but has consciously elected to commit a breach of his obligations, whatever his motives may have been. The word *dol* in Art. 1150 is, therefore, also to be distinguished from the words *mauvaise foi* as they are used in Art. 1153.

Numerous cases have occurred in which it has been held that a debtor was disabled on account of his fraud from pleading that Art. 1150 should apply. There was, for instance, the case where an agent's conduct had been objectionable because, without his principal knowing it, he was at the same time counsel for the company which it was his duty as an agent to sue.[3] In another case it was held that Art. 1150 would not limit the liability of a debtor if he advanced a merely ostensible reason for not performing the contract, the true reason being that he wanted to get free from an onerous contract.[4]

With the exception of the case of a *dol* on his part a debtor, according to Art. 1150, will never be held liable for damages which have not been foreseen nor could have been foreseen at the time of the formation of the contract. It is clear that, as a matter of construction, the word "reasonably" must be read in this sentence.

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[1] Civ., May 3, 1897, S. 1897, 1. 319 ; D.P. 1897, 1. 319.

[2] [1933] A.C. 449.

[3] Req., January 30, 1929, S. 1929, 1. 191.

[4] Req., July 2, 1929, D.H. 1929, 413.

In opposition to the rule of English law, as stated in *Hadley* v. *Baxendale,*[1] and in the recent case of *The Arpad,*[2] it is generally held by French courts that, as a rule, and at least in commercial cases, a seller of goods must foresee that the purchaser of these goods intends to resell them; and he will, therefore, be liable, in the case of a breach, for all the damage which is suffered by the purchaser from the fact that it has been impossible for him to perform a subsequent contract. In other words, French judges will not look only at the market price of the goods, but will calculate the damages *in concreto* and award to the creditor the actual amount of damages suffered by him consequent upon the breach of contract.

A difficult question has arisen in connexion with the interpretation of Art. 1150, namely as to whether only the cause of the damage, or its importance as well, must have been foreseen by the parties at the time of the contract.

No difficulty occurs when the court ascertains, as a matter of fact, that a special given damage has not been foreseen and could not have been foreseen by the parties; in this case Art. 1150 makes it clear that the debtor is not liable for such damage. Thus, in the case imagined by Pothier of a horse which is not delivered by the seller in due time, and the buyer, a canon, is therefore unable to get in due time to the place where he would have become entitled to a large income from his canonry; if the seller of the horse has not been made aware of this fact at the time of the sale, he will not be liable to the buyer on account of this loss of profit.

A rather more modern illustration of the rule is given by a decision of the court of Algiers,[3] where as a consequence of the loss of his trunk by the railway company a traveller had been unable to proceed to America, where he had been offered a very profitable situation. In another case it was held that a carrier could not foresee, unless he had been specially told of it, that a short delay of some hours in the delivery of goods would prevent their owner from shipping them to Syria, and that the owner of the goods would therefore have to pay a very heavy penalty to the purchaser.[4] Nor will a railway company be held to foresee that on account of a delay of twenty minutes in the arrival of a train, a person will miss an opportunity of entering into a contract.[5] In another case also it was held that a carrier could not foresee that the chest handed to him contained bottles of samples, and so he could not be held liable if some of these bottles happened to be broken in course of transport.[6] Other illustrations of the same rule are the cases that we have already cited as being cases where no actual damage had been inflicted ; these have been treated by the courts as being cases in which the damage alleged could not have been foreseen by the debtor.

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[1] (1854) 9 Ex. 341.

[2] [1934] P. 189.

[3] December 7, 1891, S. 1892, 2. 116; D.P. 1892, 2. 44.

[4] Req., November 23, 1897, D.P. 1899, 1. 547.

[5] Civ., July 9, 1913, S. 1913, 1. 460; D.P. 1915, 1. 35.

[6] Civ. November 22, 1904, S. 1905, 1. 350; D.P. 1907, 1. 415.

It may be seen from certain cases that the Court of Cassation exercises strictly its right of control on this point. It has, for instance, set aside a decision of the Commercial Court of Châlons-sur-Marne, in a case in which casks had been delivered after the time specified in the contract ; the plaintiff alleged that he had suffered damage from the fact that he had been deprived of the casks at the time of the grape harvest, and also from the fact that he had been unable to perform a particular contract, and the court awarded him damages on these two grounds. The Court of Cassation reversed the decision, as it was not made clear that the other party had known of the alleged contract at the time when he had undertaken to deliver the casks.[1] In another case the Court of Paris had given damages to a plaintiff because his train had been delayed and he had missed the opportunity of entering into a contract. The court justified its decision on the ground that " a railway company knows as well as anybody else that people mostly travel on business and that delay may be the source of an important damage " ; the Court of Cassation also set aside this decision for lack of sufficient " motives." It may be said, therefore, that damage will not be taken into consideration by the courts unless it could have been foreseen by the parties with a certain precision as to its cause, and the fact that some indefinite damage can be foreseen to be likely to arise from the breach will not be held sufficient.

A further important question, the existence of which we have already pointed out, is the following : Is it also necessary that the parties should have foreseen at the time of their contract the importance of the damage that a breach thereof would probably or possibly involve ? The question is the same as that which was put to the English courts in the famous *Polemis* case.[2] As a matter of fact the question has arisen frequently in France, always in connexion with the loss of trunks, bags or chests by a common carrier. It is clear that the loss of a trunk is an event which can be foreseen by the parties at the time of the contract, and that such an event will inflict damage on the owner of the trunk. But is the common carrier to be liable up to the actual value of the trunk, however great it may be, and in spite of the fact that there was no circumstance present such as would draw his attention to the high value of the goods contained by the trunk ?

French courts, as well as French doctrine, answer this question in the negative. A common carrier will not be liable beyond the value which he might be expected to attach to the goods, all the circumstances of the case being taken into consideration. Thus the Court of Cassation said :[3]

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[1] Civ., November 21, 1910, D.P. 1911, 1. 208.

[2] [1921] 3 K.B. 560 (C.A.).

[3] Civ., July 7, 1924, S. 1925, 1. 321, with the observations of Professor Lescot ; D.P. 1927, 1. 119.

Article 1150, far from holding a *bona fide* debtor liable for damages the amount of which would go beyond his expectations, provides expressly that, except in the case of fraud, a debtor shall only be liable for damages which he could possibly have foreseen at the time of the contract.

The circumstances of the case in which this decision was given were as follows. A shipping company had delivered for carriage to a railway company a chest despatched from America. With the intention of defrauding French customs its value was declared to be 475 francs. The railway company was entrusted with the making of a declaration to the French customs on this basis as an agent for the owner of the goods. The chest was subsequently lost, and the company was sued for damages. The plaintiff offered evidence that the actual value of the chest was of 16,685 francs, but the defendant company pleaded that they had not been able to foresee that the damage involved by the loss would be more than 475 francs ; and the Court of Besançon held that that plea was good, and that according to Art. 1150 of the Civil Code the damages ought to be limited to that sum. The Court of Cassation dismissed an appeal against that decision.

The principle operates easily enough when the value of the goods lost has been declared to the common carrier as in the preceding case. But in most cases this is not the case, and some other guiding rule is necessary. The courts have frequently laid down that the question as to the amount of damage likely to arise from a breach is to be decided with due regard to the circumstances of each case. This has been specially asserted in cases where the luggage of a passenger has been lost :

> Railway companies must foresee that travellers will take in their luggage things of a more or less considerable value ; it is, however, the duty of the courts, in accordance with Art. 1150, to mitigate the liability of the company, in the case of a loss or of a dispute regarding the amount of damages, by considering the circumstances of each case, and by appreciating the quantity and value of valuable things which a traveller was normally entitled to take with him, respect being had to his profession, his special position, the reason for his journey, and the price of his ticket.[1]

As a consequence of this rule, a passenger will not be allowed to claim full damages, if he has enclosed in his bag, which is lost, banknotes which constitute his only property ;[2] but a commercial traveller for a lace manufacturing company who has put valuable lace into his luggage, which is lost, will be fully indemnified.[3]

The Exceptions to Art. 1149.—The principle that damages are to be equal to the actual loss of the creditor is in French law subject to several exceptions. The *théorie des astreintes* above mentioned cannot be regarded as one of these, as it is concerned with specific performance rather than with damages proper. But exceptions to Art. 1149 may arise either from the judicial theory of *partage des fautes*, or from the specific provision of Art. 1153, or from the stipulation of a penalty clause in the contract.

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[1] Civ., December 29, 1913, D.P. 1916, 1. 117.

[2] Paris, August 11, 1903, S. 1903, 2. 309 ; D.P. 1904, 2. 302.

[3] Req., March 25, 1912, D.P. 1913, 1. 341.

The judicial theory of *partage des fautes* is to the effect that if the creditor himself is in some measure responsible for the non-fulfilment by the debtor of his obligations under the contract, the damages due will be mitigated, in such proportion as the fault of the creditor accounts for the breach of contract.

A railway company, for instance, is in France responsible in contract for the safe arrival of a traveller at his destination. If, therefore, the traveller meets with an accident during the journey, the company will as a rule be liable for damages. But if it adduces evidence that the accident is partly due to the traveller's own fault, and if the court finds as a matter of fact that the traveller was responsible as to one-fifth for the accident which has occurred, the company will only be condemned to pay 32,000 francs of damages, where the total loss inflicted on the traveller amounts to 40,000 francs.[1] So again a hotel-keeper is responsible in contract for the safe keeping of a traveller's effects. The damages for which he is liable will be mitigated, however, if such effects are stolen, provided the traveller himself is in a certain measure to blame, *e.g.* because he has left his things unattended in his room which was on the ground floor and the window of which was open.[2]

It has been observed that this practice might in many cases conflict with Art. 1151 of the Civil Code, as it leads to indirect damage being taken into consideration. On the other hand, there is a tendency in the courts to consider more the intrinsic seriousness of the faults than the proportion in which they account for the damage. However, the theory of *partage des fautes* is firmly established in French practice and it is now considered as good law by the whole of French doctrine, both in contract and in tort. It constitutes the first exception to the principle that a debtor must restore in its totality the damage arising from his breach.

A second exception to the same principle exists where there is a specific provision of the law, either that the damages awarded shall not exceed a certain amount, or that they shall be calculated according to some special rule. As examples of the former we may cite Art. 1953 of the Civil Code (as altered by law of April 8, 1911) which limits to 1,000 francs the liability of an inn-keeper for the loss of the effects of a traveller, Art. 216 of the Code of Commerce which limits the responsibility of a shipowner on account of liability incurred by the master, and Art. 41 of the law of May 31, 1924, relating to transport by air.

More important than these particular provisions is a stipulation of a general nature enacted by Art. 1153 of the Civil Code. This Article provides that in the case where there is non-performance of an obligation to pay a definite sum of money, damages shall be equal to the legal rate of interest (fixed by a law of 1918 at 5 per cent. in civil matters and 6 per cent. in commercial matters). Such damages are to be awarded irrespective of the fact of any damage being suffered by the creditor, or of the importance to the creditor of that damage. In all cases where a debtor fails to pay a sum of money in due time, Art. 1153 itself determines conclusively that damages shall be due and the amount of damages to be paid.

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[1] Paris, June 3, 1926, D.H. 1926, 368.

[2] Req., April 12, 1929, S. 1929, 1. 232.

Beyond doubt Art. 1153 was meant, at the date of the Civil Code, to be a strict and rigid rule, the aim of which (the avoidance of litigation) would be defeated if any exception were admitted. But in course of time it has been felt that the rule, if strictly applied, was likely to produce hardship, and the courts have therefore construed Art. 1153 as relating only to the general damage arising for the creditor from a delay in payment; and have allowed additional damages to be claimed by a creditor if, in addition to this general damage, he has suffered some other certain loss.[1] This practice has been approved by a law of April 7, 1900, which has, however, made a twofold restriction. Additional damages can now be claimed by a creditor in such a case only on the condition that the alleged loss does not arise from the delay in payment, and provided that the breach is due to the *mauvaise foi* (*mala fides*) of the debtor.

What the first of these conditions means is not very clear; probably it is only included to secure that other damage is alleged than the fact that the creditor has not had the disposal of the money in due time. At any rate it seems that the only effect of the wording of the law is that a court will be bound to say in giving its reasons that the loss, for which additional damages are given, is "independent of delay"; but it will not prevent a court from taking a damage into consideration, if it is satisfied that the contrary solution would lead to a grave injustice.

The second restriction, which is imposed on the power of the courts to give additional damages in the case of Art. 1153, is that there must have been *mauvaise foi* of the debtor. This has been interpreted by the courts as making the granting of additional damages impossible unless there was on the part of the debtor an actual intention to damage the creditor through the breach; it will not be enough, therefore, for the debtor to have delayed his payment without justification. This has been so decided by the Court of Cassation in a case where the creditor had been obliged, owing to the breach of the debtor, to borrow money at a very high rate.[2]

It must be, however, mentioned that the *mauvaise foi* of the debtor is not a condition for the granting of additional damages in a certain group of cases as regards which it has been specifically enacted as an exception to Art. 1153, that the actual loss of the creditor must be made good if it exceeds the rate of legal interest. Such exceptions are specially provided for in the case of the non-payment of a bill of exchange (Arts. 178 and 181 of the Code of Commerce), and in the relations between guarantor and guarantee or between partner and partner (Arts. 2028, 1846 of the Civil Code).

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[1] See the above-mentioned decision of Civ., May 3, 1897, S. 1897, 1. 319; D.P. 1897, 1. 319.

[2] Civ., May 7, 1924, S. 1925, 1. 78.

A further exception to the rule of Art. 1149, that the damages for a breach must be equal to the actual loss of the creditor, occurs in the case where the parties have agreed that a certain sum would be paid in the case of non-performance or delay in the performance of the contract. In this case it is provided by Art. 1152 that the court is bound to give effect to the convention of the parties, and will not be allowed to award to the aggrieved party either more or less than the sum thus agreed. A power to mitigate this sum is only permitted to the court if there has been part-performance of the agreement (Art. 1231).

If therefore it has been agreed between an employer and an employee that the latter shall pay a penalty of 10 francs whenever he enters the premises of a factory wearing wooden shoes, the Court of Cassation will reverse a decision which has reduced the penalty to 50 centimes.[1]

But a penalty clause, in order to be binding on a party, must have been freely agreed between the parties, and a court will usually find in this rule the appropriate remedy if it is called upon to enforce a heavy and disproportionate penalty on a defaulting debtor.

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[1] Civ., February 14, 1866, S. 1866, 1. 194; D.P. 1866, 1. 85.

NEW REGULATIONS IN THE GERMAN CODE OF CIVIL PROCEDURE.

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AMONGST the numerous laws passed since the political reorganization in Germany, the comparatively concise law relating to the new regulations of the Code of Civil Procedure cannot claim to provoke much sensational interest. It must leave this merit, if it can be called such, to other statutes and decrees, about which the daily newspapers give sufficient information. On the other hand, some of the ideas of the new statute and some of the lines of the development which have led to its passing may be of sufficient interest to lawyers to justify a short statement of its development and salient features in a paper which in the first place is addressed to non-German readers.

Need of Reform.—It has been recognized for some time that the German Code of Civil Procedure needs reform. The code at present in force dates from the year 1879. At that time it was an excellent piece of legislation. In spite of the great influence of French law, the legislators had nevertheless possessed several ideas of their own which they infused into the code. The excellent formulation, the careful avoidance of all exaggeration in the logical building up of the code, ensured its high merit.

If we wish briefly to characterize the procedure introduced by this law, though with the proviso which must be made as to all such perceptual and consciously simplifying criterions, we should be inclined to speak of it as a liberal code of procedure. The freedom of the private individual in regard to the state authorities, particularly to the law courts, was expressed in a series of separate provisions. The commencement of the individual law-suit was undertaken by the parties and their lawyers. The court took up a passive or waiting attitude. With the procedure it interfered only to a comparatively small extent. It was only when judgment was given that the State authorities took an active part.

It is generally acknowledged that the Code of Civil Procedure gave great satisfaction during the earlier years. Only with the beginning of the new century complaints, in particular as to the long duration of the law-suits, were increasingly heard. There were three reasons for these complaints, in so far as they were not to be attributed to a change of views, which seemed inclined to prefer a quick to a right decision. The most important of these is certainly the problem presented by the increase in litigation, *i.e.* the same problem of the mass of occurrences which has arisen in a continually increasing manner in all spheres of our cultural life. The industrialization of Germany and her increasing share in international commerce, only temporarily interrupted during the Great War, took effect after the coming into force of the Code of Civil Procedure. These circumstances, together with the increase of population, gave rise even before the war to a great increase in the number of law-suits—a development which was greatly enhanced after the war by disputes arising from inflation, deflation and other crises in international economics, at a time when, for financial reasons, the State found itself quite unable to make any corresponding increase in the number of judges. As a second reason, given with the reserve always advisable when making general statements, mention should be made of a certain defect in the State's legal machinery. The equipment of the courts had not kept pace with modern requirements. The judges, in spite of their general excellence, were often unable to cope with the changed circumstances. Thirdly, the advocates had only too often neglected the value which speed possesses in law-suits and which sometimes is superior even to the utmost thoroughness and accuracy. Furthermore, the great increase of the number of lawyers in the last thirty years did not improve the profession and undoubtedly resulted in an increase of the number of law-suits. The history of the reform of procedure since the coming into force of the ZPO (Code of German Civil Procedure) until to-day is the history of the remedies provided for these defects. Certainly, some of the defects of the original arrangement of the work have been removed. But besides that a fundamental change in the arrangement of the whole system took effect. Instead of the previous liberal, or, as some belittlers preferred to call it, the "liberalistic," procedure, a new code was gradually introduced, under which more and more power devolved upon the public authorities, the law courts and their officials. Almost every amendment to the Code of German Civil Procedure since 1879 headed in this direction.

Nevertheless, most of the experts were agreed that the defects as a whole remained and consequently a scheme was inaugurated to replace the code by an entirely new one. This scheme grew in importance after the last especially anti-liberal amendment had proved a complete failure. At meetings of teachers of law and practitioners fundamental questions of reform had already been considered and a commission had been convened, of which the justly celebrated Dr. Friedrich Stein, Professor of Leipzig University, was a member. By his death in 1923 the practice and theory of civil procedure was deprived of a most capable personality, a loss which has not yet been repaired. The amendment of 1924 would scarcely have been appreciated by Stein.

Draft Code of 1932.—The leading part of the work of reform devolved upon the Ministries. In 1932 the Reich Ministry of Justice published a voluminous work: the draft of a new Code of Civil Procedure, with explanatory notes, the first and larger part of which deals with the actual law of procedure. The author of this part was the Ministerialrat of the Reich Ministry of Justice Erich Volkmar. The second part, composed by Ministerialrat J. D. Sauerlaender, dealt with questions as to execution of judgments and orders, a subject in which reform was regarded as especially necessary. The first part followed to a great extent the Austrian rules of procedure, representing on the whole the course of reform already taken, namely the concentration of authority in the hands of the courts, the limitation of the functions of advocates, the extension of judicial discretion, some increase in the use of forms, etc. The draft was variously criticized by the public. Many innovations were looked upon with scepticism, and there was general disappointment at the lack of originality. Though these criticisms were not clearly expressed throughout the profession, so far as the judges and lawyers of the lower courts were concerned, the opinion prevailed that the root of all evil was that the difficulty caused by the increase in litigation was not entirely understood by the legislature and that it could only be attacked by methods wholly different from those proposed in the draft. Nor was the second part welcomed with general approval. Many alterations proposed seemed radical and many were novel. On the other hand, many of the jettisoned rules had their use. Nevertheless this part met with due appreciation because of its logical arrangement and its unsurpassable correctness.

Amendment Act of 1933.—The statute, since promulgated on October 23, 1933—an amendment Act, not a new code—is accompanied by a preface by the Government and by an essay by the draftsman Volkmar in the *J.W.*[1] It is not only interesting for what it contains, but also for what it does not contain. Among the reasons given for the delay of the reform of the law relating to execution one is particularly significant: " These are days of distress which demand restrictions on execution in a far greater degree than is endurable, and the time is not suitable for such a reform." This is a reference to the large number of Acts recently published which made it practically impossible to proceed by way of execution against certain groups of the population (especially the peasants). Among the subjects further omitted there is a series of items intended to bring about simplifications and improvements, without sensational alterations. Only a few of these details can be found in the new Act. What it actually brings about are some improvements universally appreciated at the time of the publication of the draft and some other changes which realized in a special degree the demands of the new political arrangement, though, as a matter of fact, all these innovations without exception had already been provided for in the draft of 1931.

Obligation of Truth in Statements of Fact.—In the latter group may be placed the first among the new provisions. It reads—nearly the same words as par. 178 of the Austrian Rules of Procedure:

> The parties are bound to give their statements concerning facts completely and in accordance with the truth.

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[1] *Jurist. Wochenschrift*, 1933, p. 2427.

This means that the parties of a suit are put under the obligation to state nothing but the truth. Volkmar himself calls special attention to the fact that a violation of this obligation does not produce any legal consequences; the obligation is sanctioned neither by a punishment nor by any liability for damages. Whether such a regulation might have ethical effects, or whether the better opinion is that legal maxims without any legal consequences only diminish the authority of legal rules, is a matter of doubt and may be left undiscussed at the present moment.

Facts of Disputes.—The next paragraph of the Act bears the heading: "Methods of Concentrating the Facts of Dispute."

First comes a provision emphasizing the exchange of pleadings which contrasts with the other avowed purpose of the amendment, namely to attach great importance to the oral hearing. Up to the present it was a principle that a party who omitted to let the court and the other party know of allegations before the hearing should not be at a disadvantage for this reason (par. 129 of the former version). There could only be a disadvantage with regard to costs, but no consequences in the substantive law followed a contravention against procedural law. Contrary to this, par. 279 of the new version prescribes that, under certain circumstances, an argument out of time could be rejected.

Notice of Appeal.—Another of the new provisions has interesting antecedents. In Germany notice of an appeal against a decision of first instance had to be presented in writing at the court of appeal. The original version of the ZPO (Code of German Civil Procedure) only prescribed that this document must contain the statement of the grounds of the appeal. The applicant was not compelled to state in it in what respects he demanded an alteration of the decision and how he proposed to substantiate his demand in the court of appeal.[1] This he could state at any time he liked. Considerable delay resulted and the amendment of 1924 sought to remedy this defect by making it necessary to substantiate the appeal. The appellant was bound to hand in a document of substantiation together with the document containing the appeal. In the first he was to state what applications he intended to make at the hearing and what new facts he was going to adduce. This innovation was of little use. According to the original law the appellant was allowed to wait four weeks after the delivery of the decision of the court of first instance before giving notice of appeal. By the amendment of 1924 he was allowed another four weeks for substantiating his appeal. Consequently it used to take and still takes two to three months, as a rule, before the court of second instance is able to deal with the case. To this it must be added that the Reichsgericht interpreted the provision of the amendment in a way which made it of little importance from the point of view of the practitioner. It pointed out that a party by omitting the statement of new facts asked for a revision of all the actual and legal principles of the decision in first instance. The omission of the statement had therefore no other consequence than that the court could reject arguments out of time in case of a serious fault attributable to the party; and that, in any case, the party was not bound to abide by the statements made in the document of substantiation. In this way the substantiation of appeal was reduced to a mere formality. Here the new version has attempted an improvement, though one of doubtful efficacy. It has transformed the court's right of rejecting an argument into a duty of doing so. No doubt the courts will attempt to find a loophole to prevent themselves from being compelled to neglect substantive law for a formality, and will act with great caution in attributing a serious fault to a party. Probably it would have been better to have shortened the exceedingly long periods allowed for the appeal and its substantiation.[1]

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[1] It is true that par. 519, II, former version, required the document of appeal to contain the above-mentioned statements. But this was only a *lex imperfecta*, the contravention of which was without disadvantage and therefore usual.

Direct Evidence.—To an English reader the provisions summarized in Chapter III under the headline "Directness of Evidence" may be still more difficult to understand. They are intended to correct defects in German civil procedure, which are probably of a nature unknown to the laws of procedure of other countries. It will suffice to describe the situation as it developed in recent years.

In Germany every law-suit of which the object in dispute is at least RM. 1,000 in value (about £70) must be decided by a court consisting of three judges. The court of appeal, also, consists of three judges. The courts, being overburdened, have sought to avoid all three judges being engaged in all stages of the proceedings and to find a way of securing that the formal steps in the suit should be dealt with by one of the judges alone. Since 1924 two ways have been open. The amendment of 1924 instituted the so-called *Einzelrichter system* (system of single judge). Every case commencing at the *Landgericht* (High Court) was, as a rule, at first dealt with by a member of this court, who was supposed to prepare the case so far that it would need only one hearing before the full court, the law leaving it to the discretion of the single judge[2] whether or not to hear witnesses himself. As a result, in practice, of this arrangement, all witnesses were heard before the single judge and thus the decisions of the three judges in council were not given on the immediate impression of the witness's personality but only on the minutes drawn up by the single judge as to the witness's evidence. This state of things gives rise to criticism, especially in cases where the statements of different witnesses diverged from each other. The same effect was produced by another institution of German legal procedure, namely the *beauftragter Richter* (mandatory judge). If a case had already devolved from the single judge upon the bench of three judges, the latter was entitled to transfer the case to one of its members or under certain circumstances even to another judge for further arrangements, in order that this judge himself should hear the witness.[1] The mandatory judge was not necessarily a member of the bench of three judges. If the witness resided in a different place, the hearing, as a rule, took place before the court of his residence in order to save him the expense of the journey; the court of this place, after the hearing, sent the records back to the first court. In this way it was possible that even under the procedure before a single judge a court of another jurisdiction would participate in the procedure and that where the witnesses lived in many different places, the records would be forwarded from one place to another, a proceeding which took a considerable time. The result was that the judge who finally decided the case had to deal with a good many minutes of evidence of differing values, instead of having a personal impression of the witness himself. This certainly was not satisfactory. The amendment attempts a remedy. Its aim is to produce direct evidence which will enable the judging court to hear every witness personally and to pass its decision under a vivid impression of the parties' and witnesses' personalities, if possible, after only one hearing. Only in exceptional cases are single and mandatory judges to be allowed to hear witnesses and experts. Where the court cannot be expected accurately to appreciate the evidence without having a direct impression of the witnesses, the choice is to be left to the court itself.[2] Volkmar[3] mentions the enthusiasm which the demand for introducing direct evidence, recommended by Professor Kisch, raised amongst the members of the Congress of German Lawyers at Leipzig. Even if, in spite of Volkmar's and Kisch's opinion, the innovation is not to be regarded as a "conclusion of the new conception of the State," since for a couple of years past it has been recommended by scholars like J. Goldschmidt, Ernst Wolff and Leo Rosenberg,[4] this enthusiasm is understandable. What seems surprising is that no one asked how the present situation was brought about. Was it due to the indolence of the judges, as Rosenberg suggests? To affirm this would be unjust. At the time when the institution of the single judge was introduced—by Volkmar himself be it noted—it was justified by the intolerable congestion of the courts. The mandatory judge is an earlier institution. It was introduced in order to save the parties to a suit the expense arising from the witnesses' journey to the residence of the court or the judge's journey to the witness's domicile. In view of the fact that the actual situation which has existed in Germany for years is likely to last, the innovations were intended not to cure the illness itself but its symptoms. It will, perhaps, take some time to make this clear. For the decrease of the number of cases at the courts, which has taken place in the last two years and is continuing, makes the problem of dealing with the increase of cases less urgent at this moment than during the preceding years.

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[1] It is significant that the Japanese Code of Civil Procedure, though very much like the German law, demands only a fortnight's period for appeal. In Austria the period for appeal is also a fortnight.

[2] Par. 349, II, former version.

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[1] Par. 361, 365 former version.

[2] Par. 349 II, 375 of the new version.

[3] *Jurist. Wochenschrift*, 1934, p. 2431.

[4] *Jurist. Wochenschrift*, 1931, p. 2446; *Judicium*, III., p. 390; *Zeitschrift für deutschen Zivilprozess*, 57, p. 327.

Oaths.—Of no less interest from the point of view of the sociologist and the lawyer are the innovations in Chapter IV, which is headed "Alterations in swearing Oaths." According to par. 391 (new version) a witness is henceforth only exceptionally to be sworn. As a rule, he is to give evidence without confirmation by oath. The reform of criminal law will probably allot a punishment for an untrue unsworn declaration. The alteration is a result of the fact that during the last decades the number of sentences for perjury has steadily increased; and for a long time the reform of the law as to oaths had been widely demanded. The so-called "epidemic of perjury" is to be abolished by decreasing the number of confirmations by oath. The objections to this remedy for a difficult situation, particularly so far as they concern the use of evidence not confirmed by oath, do not need further statement.[1]

There is another even more remarkable alteration in the same chapter of particular interest to an English reader, because this innovation has been influenced by English law—though only indirectly through Austrian law. The former German law, derived from the French legal institution of the *serment décisoire* (Art. 1357 C.C.), enabled one party under certain conditions in case of doubtful evidence *de déférer un serment décisoire* to the other party concerning a fact alleged or denied. If the other party refused to take the oath, the allegation or denial was considered as true; if the other party swore the oath, the fact contended or denied in the oath was considered to be in accordance with the sworn oath. In both cases further evidence was not admitted.[2] The judges were never allowed to subject the swearing party to a cross-examination, but the statement to be confirmed by oath had to be briefly set out in writing. The party could choose whether or not to swear the oath.[3] It was not permitted to ask the swearing party any further question. The whole institution was an exception from the rule that the parties could not personally give evidence. The strict limitations provided by the law were consequences of the so-called *Verhandlungsprinzip* (*i.e.* principle of taking into consideration all those facts, and only those facts, which the parties have produced). With the decline of this principle the institution became more and more meaningless. Nevertheless it obtained a considerable importance in German judicial practice. Critical observers are right in stating that it succeeded in gaining a much more important position than its French prototype. In France and in Belgium the oath of the parties, according to Dr. Norden's statement, may almost be counted among the "antique relics of law."[1] In Germany to a great extent, though not in the majority of cases, the oath of the parties finally formed the basis for the decision.

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[1] Ernst Cohn, *Reform des Interventionsprozesses* (1931), p. 55; L. Rosenberg, *Zeitschrift für deutschen Zivilprozess*, p. 329.

[2] Par. 445, 2 PO, former version.

[3] There is a story that a peasant, asked by the judge whether he knew about the significance of an oath in the law, replied: "Yes, my Lord; if I swear, I'll win the case."

The new German law follows a course not only taken by English law, but by most of the Continental legal constitutions, characteristically also by the Japanese Code of Procedure, which also in many other respects is very similar to the German rules. Par. 445 of the vew version reads :

> A party not having given full evidence of his case with documentary proof, nor having offered any other proof, may offer evidence by applying that the other party should be heard about the facts in question. But a party's hearing can also be ordered by the court itself without regard to the evidence or any application by the other party.

The court is entitled to order the party heard to confirm his statement by oath (par. 452). If the party refuses to make either a statement or to take the oath, the court may consider this fact in considering the evidence. The former regulations have been abolished. It is to be expected that the new regulations, details of which are not interesting, may prove satisfactory.

Arbitral Procedure.—Chapters VII and VIII contain merely technical alterations which we need not take into consideration in what follows. But Chapter IX introduces two highly interesting and probably important innovations. These refer to arbitral procedure. In Germany the increasing influence of private arbitral procedure has caused many complaints. The innovations are intended to improve the position in two respects. They are in the first place designed to meet complaints that a person is sometimes driven by the economic superiority of the other party to accept an arbitration clause which would not have been otherwise accepted. And further, the arbitration clause often forms part of a rather voluminous contract in which it may be easily overlooked ; so that a party may find himself unexpectedly precluded from access to the courts. Par. 1025, II, of the new version prescribes as follows :

> The submission to arbitration is of no effect if one of the parties has used his economic or social superiority to compel the partner to sign the contract or to accept a condition which grants such party a preponderant influence in the proceedings, especially in regard to the appointment or challenge of an arbitrator.

This regulation was already provided in the draft of 1931. It is essentially in accordance with a proposal made in 1930 by a prominent lawyer, Dr. Heilberg.[2] Without any doubt it will, in many cases, result in the unsuccessful party in the arbitration proceedings attempting to cancel the unfavourable effects of an award by its means ; and as a result of this the arbitration clause is likely to lose its practical value for the parties, since the arbitration proceedings will no longer possess the merit of providing a quick settlement of a dispute. If this development causes the return of some commercial cases to the public courts, this at any rate will be appreciated in some quarters.

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[1] Norden, *Handbuch der Rechtsverfolgung in Belgien*, p. 196.

[2] *Cf. The Reasons for the Draft of* 1931, p. 394.

According to par. 1027 of the new version, a submission to arbitration must be drawn up in writing, and the document containing it must not contain any other terms than those referring to the arbitration proceedings. Unfortunately, the legislator has deprived this provision, meritorious in itself, of its value for judicial practice by making it inapplicable to most agreements, namely those in which all parties are merchants.[1]

The last paragraph contains a good many provisions which only serve the purpose of technically adapting the former adjective law to the new law. These latter provisions are of no fundamental importance and therefore of no interest here.

It is perhaps surprising that this Act does not contain anything serving the realization of the well-known demands of the National-Socialist party or their anti-Semitic aims. But there was no occasion for such inclusion in a statute which only altered the Code of Procedure, after other statutes, especially the *Rechtsanwaltsordnung* (legal provisions for the conduct of lawyers) had been already so thoroughly altered. Still, the text of the ZPO is not entirely free from anti-Semitic tendencies. Par. 1052 prescribes the conditions on account of which an arbitrator may be challenged. Par. 1032, III formerly read :

> Minors, deaf and dumb persons, as well as persons deprived of civic rights may be challenged.

In the new version the Act continues at this passage :

> There may further be challenged non-Aryans in the meaning of the Act of 7.iv.33, and the regulations which accomplish it.

Non-Aryan in the meaning of the Act of April 7, 1933, is every person one or more of whose four grandparents was of Jewish descent.

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[1] Par. 1027, II, new version.

MENS REA IN GERMAN AND ENGLISH CRIMINAL LAW.[1]

[*Contributed by* PROFESSOR HERMANN MANNHEIM, *Berlin University.*]

GERMAN jurists have hitherto bestowed upon English substantive Criminal Law little more than superficial attention. When, nearly a hundred years ago, Ernst Mühry published his German translation of Serjeant Henry J. Stephen's *Summary of the Criminal Law* (Göttingen, 1843), he said in the Preface (p. iv):

> English law has not yet met with in Germany the consideration to which it is entitled. Influenced twofold along Roman lines we have been satisfied with a knowledge of its main features without penetrating into the particulars. Mistakes thus became inevitable.

In the meantime things have not considerably changed. The German jurists have always taken an interest in only a few parts of English Criminal Law, viz. in the organization of the English criminal courts (Gerichtsverfassungsrecht)[2] and in the English Criminology and Penology (Kriminalpolitik),[3] but not, however, in the English substantive Criminal Law. It is a matter of surprise to see how superficially the contributors to the otherwise very carefully written work *Vergleichende Darstellung des deutschen und ausländischen Strafrechts*,[4] which was published in the first decade of the twentieth century as an introduction to the reform of the German Criminal Code, have dealt with the English Law. This lack of thorough research-work has led to the result that the comparisons drawn by the German jurists between English and German Criminal Law have, in many respects, given a false idea of the former. Characteristic of this are the remarks of v. Liszt,[1] v. Hippel,[2] Löffler[3] and, in a more recently published book, of Schaffstein.[4]

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[1] The author wishes to acknowledge his indebtedness to Mr. A. Carr, who kindly read the manuscript and suggested numerous improvements in its English style.

[2] I quote here Franz Adickes (the well-known Oberbürgermeister in Frankfort), *Grundlinien durchgreifender Justizreform*, 1906, and Heinrich Gerland (Professor at the Jena University), *Die englische Gerichtsverfassung*, 2 vols., 1910.

[3] This interest has been proved—besides the numerous works of Aschrott and others—by the translation of several modern English statutes concerning those matters, viz. the Children Act, 1908, the Prevention of Crime Act, 1908, the Probation of Offenders Act, 1907, and the Mental Deficiency Act, 1914, which form the volumes 27 and 43 of the *Sammlung Ausserdeutscher Strafgesetzbücher* (Verlag Walter de Gruyter & Co., Berlin and Leipzig).

[4] Setting aside this weak point, the work which includes sixteen volumes deserves the praise that Jerome Michael and Mortimer Adler, *Crime, Law and Social Science* (1933), p. 368, fn. 55, distribute to it.

On the other hand, English jurisprudence has no close acquaintance with the German doctrine of mens rea. Therefore, many Anglo-American readers may welcome a survey of the German Schuldlehre in conjunction with a comparison between English and German law. Perhaps I should apologize for mentioning some points of view and some facts in regard to English law which may be obvious to an Anglo-American jurist without being specially pointed out. I have done so, on the one hand, on account of the possibility of comparing the two legal systems with greater clarity, and, on the other hand, in order to render accessible to the German scientists some details which might not otherwise be within their reach.

Part I. The German Law.

Historical Retrospect.—The doctrine of mens rea, the so-called Schuldlehre, constitutes one of the most carefully elaborated parts of the science of German Criminal Law. The number of text-books, monographs, treatises and judgments of the courts which are devoted to this topic is immense. In order to limit the extent of the following survey I am compelled, for the time being, to omit two very important questions, viz. the influence of infancy and insanity (in the widest sense of the word) and the problem of the criminal responsibility of the master for the servant.

My historical retrospect, also, must be somewhat brief. Moreover, the fact that the German law—like the laws of most other civilized nations—has developed from the principle of responsibility for the mere result (Erfolghaftung) to the principle of the guilty mind (Schuldhaftung), is too well-known to need further explanation. The evolution has been both slow and difficult, but its line of development has been unmistakable. It was not, of course, the universally accepted opinion that in the earliest times it was the principle of Erfolghaftung that predominated. But, after all, there are only unimportant shades of differences between the various conceptions. The earlier conception was inclined to take the old Teutonic Criminal Law as resting fundamentally on the doctrine of mens rea, making at the same time very far-reaching reservations in favour of the Erfolghaftung. The more recent historical school, on the contrary, acknowledges that these reservations are weighty enough to deprive the old German law of the character of a law resting fundamentally on the doctrine of mens rea. An exponent of the earlier conception is Wilda,[1] who states that also among the old Germans " the unlawful will was the very foundation of all the punishable wrong, although every action in the first place was judged according to its results and its external characteristics." It is just fifty years ago that Leist, the then Professor at the Jena university, whilst endeavouring to work out a homogeneous Aryan system of the earliest law, asserted that it was a peculiar feature of Aryan law that in all wrong-doing it is the malicious will which is the essence of the crime. According to Leist, it was only the intentionally committed offence which, among the Aryan tribes as contrasted with the non-Aryans, challenged the revenge of the injured.[2] But since Heinrich Brunner's investigations,[3] which are generally accepted by the Anglo-American jurists also,[4] the predominating doctrine can be expressed as follows : The old German law—like the law of most other peoples—seeks to exact no punishment in the absence of the guilty mind. Nevertheless, the extreme formalism of this old law results in a very schematic treatment of the problem of mens rea.[5] The guilt is dealt with, not according to individual, but to typical views. Ancient German law does not ask whether the doer in the particular case really has acted with a guilty mind or not. It rather works out general criminal types, typical pictures of happenings upon the occurrence of which the question of guilt is either confirmed or disproved without further detailed examination. In certain crimes malicious intention is presumed without further inquiry; and if such an act should be regarded as an unintentional " Ungefährwerk," this presumption has to be rebutted. For the purpose of rebutting such presumptions certain typical actions are accepted without further proof: the felling of trees, for instance, or random shots. The statutes of the German Middle Ages did not go to any considerable extent beyond this standardizing conception. As evidence of this I may mention the following discrimination contained in the *Groninger Stadtbuch* of 1425: "If a man, whilst sitting on the draught-horse, or walking by the side of the cart, runs over another person, the deed is considered as Ungefährwerk; but if he be sitting or standing in the cart, he must expiate the deed as an intentional act."[1] And according to the law of Lübeck intention has been taken as proved, if there had already been a quarrel between the parties, or if the doer of the act had taken arms from his home with him.[2] Murder, according to both old German law and old English law, denotes secret killing, and the idea of homicide covers the now so-called malicious wounding with fatal result (Körperverletzung mit tötlichem Ausgang).[3] German Criminal Law, therefore, in earlier times, differed little in essentials from old English law, and both here and there were equally applicable the significant words: "Law in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows."[4]

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[1] v. Liszt, *Vergleichende Darstellung, Besonderer Teil,* vol. v (1905), p. 19, says that English common law has exaggerated the conception of *dolus* in a ridiculous manner, and p. 31 : " English common law of homicide is behind the development commenced by the Peinliche Gerichtsordnung (1532), and accomplished by the legislation of the German territories in the seventeenth and eighteenth centuries."

[2] v. Hippel, *Vergleichende Darstellung, Allgemeiner Teil,* vol. iii (1908), p. 395 : " English law shows such a low level as to our problem that it can claim only historical interest."

[3] Löffler, *Vergl. Darstellung, Besonderer Teil,* vol. v (1905), p. 261 : " English law is very antiquated as to the doctrine of mens rea."

[4] See Friedrich Schaffstein, *Die Behandlung der Schuldarten im ausländischen Strafrecht seit* 1908 (Breslau, 1928, *Strafrechtliche Abhandlungen,* herausgegeben von Dr. H. Bennecke and others, vol. 232). Schaffstein, a follower of v. Hippel, has carried on the work of his master to 1928. But he has only used the 5th edition of Kenny's *Outlines* (1913) and a Dutch paper by Bromberg (*Tijdschr. für Strafrecht,* 1925), and does not refer to any cases at all. Mr. Stroud's *Mens Rea,* published in 1914, is also unknown to him. So he comes to the conclusion, in the three and a half pages of his work which are devoted to English law, that the present stage of development as to mens rea in English law corresponds to the German Common Law (Gemeines Recht) about 150 years ago.

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[1] Wilhelm Eduard Wilda, *Das Strafrecht der Germanen*, Halle, 1842, pp. 146 and 155.

[2] Burkard Wilhelm Leist, *Gräco-italische Rechtsgeschichte*, 1884, pp. 290, 324, 348, and especially 421 *seq.* in connexion with 744, 750 ; furthermore Leist, *Alt-arisches jus gentium*, 1889, p. 286, and *Alt-arisches jus civile*, vol. i, 1892, p. 377. Against Leist see Alexander Löffler, *Die Schuldformen des Strafrechts*, vol. i, 1895, pp. 29, 45.

[3] Heinrich Brunner, *Deutsche Rechtsgeschichte*, vol. i, 2nd ed., 1906, p. 212 ; vol. ii, 1892, p. 543.

[4] See *e.g.* John Wigmore, *Harvard Law Rev.*, vol. 7, 1894, p. 315 ; Edward Jenks, *The New Jurisprudence*, 1933, p. 45.

[5] See Carl Ludwig v. Bar, *A History of Continental Criminal Law* (The Continental Legal History Series, vol. vi, London, 1916), p. 203 : " The element of inward guilt, to be sure, was not entirely neglected ; but the crude and clumsy law of proof was obliged to stop at the guilty motive as manifested in external acts."

It was not until the formulation of the Constitutio Criminalis Carolina (the so-called Peinliche Gerichtsordnung) of the Emperor Charles V, in 1532, that German Criminal Law broke away from the old Germanic Erfolghaftung and attempted a fusion with the Roman doctrine of mens rea.[5] Into the particulars of this later development, and of the countermovement which was brought about in order to restore the remains of the Erfolghaftung, I shall be able to go more deeply, however, only when I come to the discussion of the doctrine: *Versanti in re illicita imputantur omnia quae sequuntur ex delicto.*

Present State of German Doctrine.—In the sphere of the doctrine of mens rea German Criminal Law at present is homogeneous with the English at least as to the mere technical part of legislation, in so far as German law of the guilty mind is also to a great extent unwritten and developed almost solely by jurisprudence and decisions.[6] There is only a single prescription in the Criminal Code of 1871 (still in force), viz. § 59, which deals with the mens rea, and it contains neither a definition of the guilty mind nor of its sub-species. It may be that just these features may render not uninteresting an attempt to show how the German criminal courts, accustomed to take the written law as basis, have managed to perform their functions in the absence of any legal definition. This absence, by the way, is the result of well-considered design and not of accident, since the former legislators feared that any legal definition of mens rea might disturb the free development of this part of criminal science. In the last decades, however, although there is still by no means unanimity as to the advantage of legal definitions, people have started to modify their point of view. The proposed Draft Codes all contain definitions of the various kinds of mens rea.

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[1] Rudolf His, "Geschichte des Deutschen Strafrechts bis zur Karolina" (*Handbuch der mittelalterlichen und neueren Geschichte*, herausgegeben von G. v. Below, F. Meinecke and A. Brackmann), München and Berlin, 1928, p. 13.

[2] *Ibid.*, p. 14.

[3] *Ibid.*, p. 121.

[4] Pollock and Maitland, *History of English Law*, vol. ii (2nd ed.), p. 470.

[5] See Löffler, *Schuldformen*, p. 162.

[6] The following essay is founded mainly upon the Criminal Code of 1871 (abbrev. StGB), but refers also to the most important proposals contained in the numerous drafts published since 1909. There exist English translations of the StGB: Geoffrey Drage, *The Criminal Code of the German Empire*, translated with Prolegomena and a Commentary, London, 1885; R. H. Gage and A. J. Waters, *Imperial German Criminal Code* (Johannisburg, 1917).

Discrimination between Vorsatz and Fahrlässigkeit.—I should like, first of all, to deal with the purely technical side of the matter. The present German Criminal Law of the guilty mind is founded chiefly upon the discrimination between Vorsatz (*dolus*) and Fahrlässigkeit (*culpa*). This classification, whilst it is nowhere explicitly stated in the statutes, is evidently to be inferred from the particular prescriptions of the " Special Part " (Besonderer Teil) of the Criminal Code as well as from the *Strafrechtliche Nebengesetze.*[1] An action which is committed vorsätzlich is always punishable when unlawful (*i.e.* when the actor has no legal right to commit this action) and when tatbestandsmässig (*i.e.* when the actor has performed all the external acts which are described in the statute in question).[2] An act, however, which is committed simply fahrlässig is punishable only when the statute in question prescribes it *expressis verbis*. This is what has happened generally as regards offences against the person as well as in case of offences against the public safety (the so-called " gemeingefährliche Verbrechen und Vergehen," §§ 306–330 StGB) and as regards many Nebengesetze (see *e.g.* §§ 163, 222, 230, 309, 314, 316, 318, 326, 347 and so on). The number of crimes which are punishable also when committed only fahrlässig is greater than in English law. The swearing of false oaths (§ 163), the infliction of bodily harm (§ 230) and arson (§ 309) are punishable also when committed fahrlässig. The punishment of offences committed fahrlässig is generally more lenient than that of those committed vorsätzlich.

In addition to the conceptions of Vorsatz and Fahrlässigkeit German Criminal Law takes cognizance of some special kinds of Vorsatz, viz. " Absicht," " Wissentlichkeit," " Arglist," " Handeln wider besseres

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[1] So are called the statutes, beside the StGB itself, which contain Criminal Law also. Almost all the main statutes, save the " Bürgerliches Gesetzbuch " and the constitutional laws, are from this point of view " Strafrechtliche Nebengesetze " (so *e.g.* the Commercial Code, etc.). The best Commentary of the most important " Strafrechtliche Nebengesetze " is written by the late Reichsgerichtsrat Stenglein (5th ed., by Ebermayer and others).

[2] In the German science of Criminal Law the expression " Tatbestand " plays a very important part. It indicates pithily the statutory conditions upon the existence of which the culpability depends. In every section of a criminal statute there is an external Tatbestand (*e.g.* the killing of a man), sometimes called simply " Tatbestand," and an internal Tatbestand, *i.e.* the specific kind of mens rea which the statute in question demands.

Wissen," etc., which will be described later. In numerous important statutes there is no mention of mens rea at all (see *e.g.* §§ 122/3, 125, 132, 172/3, 174, 182/3, 185, 201 StGB). In other cases, although a species of mens rea is required, it refers only to a single part of the whole Tatbestand. So, for instance, in § 242 which deals with Diebstahl (a kind of theft), the intention to appropriate a thing which does not belong to the actor is demanded *expressis verbis*, but nothing is said as to the species of mens rea with regard to the act of taking away. Taking into account the unsystematic and technically defective composition of the StGB, there is, however, unanimity in so far as it is of no consequence whether the Code requires Vorsatz *expressis verbis* (as *e.g.* in §§ 108, 136/7, 162, 167, 211/2, 223, 229, 239 and many others) or does not mention the necessary species of mens rea (as *e.g.* in §§ 113, 185, 234–238, 240 and so on). In the latter case it is commonly believed that Vorsatz is required too, unless another interpretation results from the whole tendency of the statute in question.[1] It is true, it is just upon this point, viz. the tendency of a statute, that there can be a difference of opinion. Preference, therefore, is undoubtedly to be given to the method of the new Italian Criminal Code which says in Art. 42 : " No one may be punished for an act or omission deemed by the law to be an offence unless he has committed it knowingly and wilfully. . . ."

Essential Elements of Mens Rea.—The two species of mens rea, Vorsatz and Fahrlässigkeit, and their sub-species are composed of two essential parts, the element of will and the element of knowledge, or of only one of them. It is a crucial question of the doctrine of mens rea to find out the most suitable ratio of combination between these elements in every particular case. The question arises which of the two ingredients is the really predominant one. According to the theory which prevails at least externally in the German science of Criminal Law and in the decisions of the Reichsgericht, will is more important than knowledge. This fact is to be emphasized, as constituting the chief difference between the English and the German doctrine, as I shall show below. I would like to take as a starting-point some very simple and typical test-cases, similar to those brought forward by English writers too, in order to display the fundamental features of the German Schuldlehre.

Absicht.—(1) A seeks the life of his enemy B, who has caused him much evil. One day he sees him passing at a distance, but he has no arms about him save an old pistol of poor quality. Being a very bad shot he, not unreasonably, says to himself: " If I shoot now, it is very improbable that I shall kill him. Nevertheless I will try it." He shoots, and, unexpectedly, he kills B. Here the element of knowledge, *i.e.* the actor's idea that his action will produce a criminal result, exists only in the slender form of A's having thought this result to be very improbable indeed, but not quite impossible. (If he thought this result to be quite impossible, the action, of course, would not be vorsätzlich.) The element of will, however, is present in the strongest degree conceivable, for, the desire of killing B being at the very bottom of A's action, he has acted solely with a view to bring about this result. This is, therefore, the gravest kind of mens rea in German law, viz. the Vorsatz in the particular form of Absicht.

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[1] So *e.g.* in the case of the so-called " Polizei-Übertretungen " (§§ 360 *et seq.* StGB), Fahrlässigkeit is generally sufficient (*cf.* Kohlrausch, footnote before § 360, and this essay below).

In the German criminal statutes, it is true, the expression " Absicht " does not everywhere bear the same interpretation. There are, on the contrary, three groups of statutes :

(*a*) In several prescriptions the expression " Absicht," as in the above-mentioned example, implies motive, reason, design (although not necessarily ultimate design). Here there are again two categories of statutes. Sometimes an action is criminal only in case of the existence of the Absicht, specifically defined by the statute in question. To this category belong *e.g.* §§ 242 (Diebstahl), 249 (Raub, *i.e.* robbery), 263 (Betrug, *i.e.* false pretences).[1] Sometimes, however, the presence of the Absicht is only a reason for inflicting a severer punishment, the action being criminal also when committed without the Absicht. To this category belong *e.g.* §§ 268, 235 III and 236 StGB.

The crimes of this group are often characterized as " Delikte mit überschiessender Innentendenz " = crimes with predominating tendency towards the interior (an expression firstly used by Hegler), because the Absicht in these cases is referred to a result whose actual occurrence is not required by the statute. Or, speaking more explicitly, the so-called internal Tatbestand, *i.e.* mens rea, surpasses the so-called external Tatbestand. Quite another method is used *e.g.* in § 225 StGB which demands that the result is intended and has actually occurred.

(*b*) To the second group belong the rare statutes which use the expression Absicht not in the technical sense, but in the meaning of simple Vorsatz, so *e.g.* §§ 266 StBG and 312 HGB (Commercial Code). This is a usage of language which was rather common in the German criminal science about a hundred years ago. Here, although the statutes use the term Absicht, even the weakest kind of Vorsatz, the *dolus eventualis* discussed below, is sufficient.

(*c*) Between these two groups there are several statutes in which the meaning of the word Absicht is strongly controversial. The discussions arising therefrom are interesting from the light they shed on the technique of legislation and the method of interpretation of statutes. In this place §§ 274 No. 1 and 288 StGB, and above all § 239 of the Konkursordnung (Bankruptcy Act), fall to be discussed. In these statutes the term Absicht does not aim, as it does in the statutes above mentioned, at the advantage to be derived by the actor or any other person, but at the disadvantage suffered by another person (*e.g.* in § 239 KO at the disadvantage suffered by all the creditors; in § 288 StGB at the frustration of a single creditor's payment). Penal statutes of such a kind are not practical; for in everyday life a person acts with the intent of serving himself (or herself) or another person, and very seldom acts with the sole intent of inflicting harm upon another. Had, for instance, the statute which penalizes the crime of false pretences (Betrug, § 263 StGB) been formulated as many German students of jurisprudence used to imagine, viz.: "Any person who, intending to cause disadvantage to another's property . . .", scarcely a conviction would have been possible. The statute, however, runs as follows: "Any person who, intending to procure unlawfully a pecuniary profit for himself or another. . . ."

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[1] Synonymous with the expression " Absicht " in this meaning is the phrase " um zu . . ." (= with intent . . .), see *e.g.* in § 253 StGB (Erpressung = extortion), § 146 (Münzfälschung = making counterfeit coin), and § 257 (Begünstigung = acting as an accessory after the fact).

How, then, did German jurisprudence and the courts, in administering §§ 288 StGB and 239 KO, get over this difficulty caused by the statutes? Often simply by arguing from the result: As such a statute would be practically inapplicable if the conception of Absicht were interpreted as motive or purpose, Absicht must necessarily have another meaning. That is the argument used, for instance, by Hegler.[1] He emphasizes the necessity of following a teleological method; it must be always examined, so he said, whether the statute in using the conception of Absicht intends to characterize the individuality of the actor or that of the act. In the first case, as he admits, a bad motive is required to be proved against the actor; in the second case the statute in question only refers to facts which are important as indicating the social noxiousness of the deed, and thus, not wickedness of motive but only Vorsatz is needed. He puts § 274, No. 1 StGB, with which he deals especially, into the second category. It is equally possible to state the contrary: if the legislator had intended to secure to the statute just mentioned a larger sphere of applicability, he might have dispensed with the use of the word Absicht, the use of which is striking in this connexion. The Reichsgericht also upholds a teleological method; it says: "In what particular meaning the expression Absicht is used in any individual case can be decided only by bearing in mind the legal aspect of the offence in question as well as the purpose which the legislation had in view in penalizing such an action" (RGSt 54, p. 351). Unfortunately, such a reference to the "special quality of the offence" (the famous German phrase "Natur der Sache") and to the "purpose pursued by the legislation" (the German "Zweck des Gesetzes") is often rather useless, because these terms themselves are too ambiguous. So it happens that the Reichsgericht, now and then, shows an undecided attitude even as to the interpretation of the same statute. Dealing with § 239 KO the Reichsgericht says *e.g.* in RGSt 66, p. 88:

> Although in § 239 KO the expression Absicht is not used in the meaning of motive or ultimate purpose, nevertheless negligence or *dolus eventualis* does

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[1] Hegler, *Juristische Wochenschrift*, 1923, vol. 52, p. 608.

not suffice, nor does the mere knowledge that the action must necessarily result in damaging the creditors; the mens rea, on the contrary, consists in the determined volition of causing the mentioned result, viz. damaging the creditors.

In the latest decision, however, which was issued a few years after the former decision, the Reichsgericht says:[1]

> If the prisoner had recognized that her action must necessarily result in such a disadvantage, then she had acted with Absicht in the meaning of the statute. It would not be any the less opposed to such an Absicht, if the prisoner had hoped to be able in the future to make terms with her creditors; for the applicability of § 239 KO does not require that the doer intends the damage of the creditors as an ultimate purpose.

In his footnote to the latter decision the Saxon Attorney-General Weber points out as follows: The Absicht shows which kind of thought has been decisive for the actor, what has been the central motive for his act. The Reichsgericht, by treating the knowledge of the necessary result as a sufficient reason for punishment, nullifies the whole difference between §§ 239 No. 3 and 240 No. 3 KO. It is quite true, says Weber, that Absicht is not equivalent to ultimate purpose; but the antithesis to ultimate purpose is another purpose, not mere knowledge. The conclusive argument against the Reichsgericht, indeed, is that every difference between the statutory wrongs in § 239, Nos. 3 and 4,[2] on the one hand and in § 240, No. 3,[3] on the other disappears if the Absicht in § 239 is treated as simple Vorsatz.

The legislator may draw the following lesson from these difficulties: Statutes ought not to demand too much as to the mens rea; otherwise the practice of the courts, assisted by a helpful literature, endeavours to elude it in order to bring within its sphere all the cases which it believes to deserve punishment. The lawgiver, striving for a stronger differentiation between the individual Tatbestände and kinds of punishment, may perhaps want to punish with particular severity the Absicht of an actor who endeavours to damage another person. Such a paragraph, however, seems unobjectionable only when the statute, at the same time, provides a more lenient paragraph which may be applicable when the act is done without Absicht, merely with Vorsatz. In the contrary case, the legislator ought to consider carefully before inserting in a statute—which does not represent merely a severer form of another section—the requirement of Absicht.

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[1] *Juristische Wochenschrift*, 1934, p. 1290, No. 10 II. The same opinion is expressed by the Reichsgericht in *Jur. Wochenschrift*, 1930, p. 2536, No. 5, with reference to § 288 StGB, and by Köhler in his footnote. Recently, Bruns has dealt with the question in the *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 53, pp. 459 and 488. Fundamentally agreeing with the Reichsgericht's opinion, he says that the motive of favouring a creditor must render it impossible to assume the Absicht of damaging another creditor.

[2] *I.e.* fraudulent bankruptcy committed by keeping the account-books carelessly, or by keeping none at all.

[3] *I.e.* simple bankruptcy committed as to the external Tatbestand in the same way as the fraudulent bankruptcy.

All the German Draft Codes, without exception, contain legal definitions of the concept Absicht; see, for instance, § 18, Draft Code, 1927: "The doer acts absichtlich, when it is of great consequence to him to cause the result characterized in the statute."[1] Although this wording aims apparently at legalizing the narrower interpretation of the word Absicht, it may be doubted whether this result would have been attained.

Dolus Directus.—(2) Another example: A, after hard internal struggles, has made up his mind to kill his dearest friend B that he may be able to marry B's wife. He administers to B a poison which A, being a doctor, knows must have a fatal result. B dies. In this case, the element of knowledge is more strongly accentuated than in the case mentioned in (1); for A knows that B, as far as human judgment goes, will die after having taken the poison. The element of volition, however, is not so strongly accentuated as in the first case, in so far as A has been acting reluctantly and he would have much preferred to have attained his object without having been compelled to kill B. B's death is agreeable to him not as such, but only as being the necessary way and means to what is, after all, his sole object. That is the form of mens rea which, in German Criminal Law, occupies the second place in order of gravity, viz. the *dolus directus*, also called simply Vorsatz. It requires that the wrong-doer knows that his action will necessarily, as far as human judgment goes, result in the effect prohibited by the law. Thus, although here the element of knowledge exists perhaps in a much higher degree than in the cases of Absicht, the *dolus directus* represents a weaker form of mens rea than the Absicht, the element of will being less accentuated. It must, of course, be admitted that, as already mentioned, the difference between the Absicht and *dolus directus* is sometimes nullified by a too wide interpretation of the conception Absicht.

In the Draft Code of 1927 the *dolus directus* is defined as follows: "The doer acts vorsätzlich when he performs the constituent elements of the offence with knowledge and will" (§ 17), which wording exactly expresses the present law as well as the contents of Art. 43 of the Italian Criminal Code.

Dolus Eventualis.—(3) A third example: A seduces a girl who is not yet sixteen years of age (offence against § 182 StGB). He does not know her age, but he thinks it possible, from the girl's appearance, that she may be younger than sixteen. Nevertheless, he considers: "Be that as it may, the possibility that I am, perhaps, committing a crime shall not deter me from doing so." This is the so-called *dolus eventualis*, the weakest degree of Vorsatz, which has been defined by § 17 of the Draft Code of 1927—

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[1] Other proposals of formulation which do not contain any material changes are to be found, for instance, at Gerland, *Kritische Bemerkungen zum Allgemeinen Teil des Strafgesetzentwurfs von* 1919 (1921), p. 15, and Goldschmidt, *Jur. Wochenschrift*, 1922, pp. 252 *et seq.*

in agreement with the still prevailing opinion as follows: "The doer acts vorsätzlich when he . . . thinks that the performance of the constituent elements of the crime by his action is merely possible, but when, in case of realization, he consents to it." If A, on the contrary, whilst at first in doubt as to the girl's age, finally comes to the conclusion that she must be more than sixteen years, then, at most, it would be a case of negligence which is here, according to § 182, not punishable at all. One would call it conscious negligence, since the doer has realized the possibility of doing something punishable without, however, being willing to do so. It would be unconscious negligence if the actor had not realized at all that he might be going to do something punishable.[1]

Present German law, too, treats the *dolus eventualis* generally as the *dolus directus*. It is covered in just the same way by the conception Vorsatz. Only in those few cases in which the Criminal Code uses, instead of the ordinary expression "vorsätzlich" (or the synonymous words "wissentlich," *cf.* §§ 153/4, 156, or "wissend," *cf.* § 171), the phrase "against the better knowledge" (wider besseres Wissen), *cf.* §§ 164 and 187, is the *dolus eventualis* not sufficient, and *dolus directus* is needed. A person, therefore, can be punished for calumny (Verleumdung), § 187, only when he or she had been perfectly aware of the falsehood of his or her statement.

Distinction between Dolus Eventualis and Conscious Negligence.—This conception of *dolus eventualis* which plays a very important part in the practice has caused great difficulties in German Criminal Law. From the historical point of view, it is rather new in relation to the conceptions *dolus* and *culpa*. The main objections to this species of mens rea are that, on the one hand, it compels the judge to apply a conception of mens rea which refers to the character as such and, therefore, is dangerous to the prisoner. On the other hand, the theory of *dolus eventualis*, by emphasizing unduly the importance of the will compared with that of the plain probability, weakens the efficiency of the administration of criminal justice. On this point further detailed explanations are perhaps needed: The drawing of a line of demarcation between *dolus eventualis* and conscious negligence, taking as basis the prevailing doctrine, is very difficult. Both species of mens rea have in common that they belong to the domain of the so-called "acting in a state of uncertainty." The doer is doubtful as to some effects or qualities of his action; nevertheless he acts. But whilst, in the case of conscious negligence, he inwardly refuses to admit the punishable result and, therefore, would not act, if he had foreseen the result as being certain, in the case of *dolus eventualis* he accepts the result, should it happen, as a part of the risk. He values too much the achievement of his object to give it up in order to remain law-abiding. Conditionally, he consents to the result. Even the conviction that the prohibited result would certainly follow his action would not restrain him from acting. This is the so-called "formula of Frank" (Frank'sche

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[1] For particulars as to negligence see below, No. 4.

Formel), which was first formulated by Reinhard Frank, the famous teacher of Criminal Law, and, with various modifications, repeated in the successive editions of his widely used commentary on the German Criminal Code. Besides him, v. Hippel is the keenest exponent of this so-called "Einwilligungstheorie"[1] which has also been adopted by the Reichsgericht for several decades.[2]

This distinction between *dolus eventualis* and conscious negligence, whilst theoretically clear, is very difficult to administer in practice. The court is compelled to give its opinion upon the hypothetical problem as to how a certain person might have behaved had he been convinced that a certain action must necessarily lead to a bad result. The task of proving inward facts is always difficult; that of proving hypothetical inward facts, however, is almost impracticable. In what way a person would have acted in conditions which are not actual but only supposed can be decided—if at all—only on the grounds of an exact knowledge of his general behaviour and his character. So the courts, unconsciously, are forced, more or less, to base their decision, not upon the particular act which is to be tried before them, but upon the whole personality and character of the doer. If the court, going upon the facts presented to it, gains an unfavourable impression of his personality, it will be inclined to maintain hypothetically that such an actor would have behaved in the same way, even if he had exactly foreseen such an evil result; in the opposite case the court will consider the matter as an act of negligence only. Such a method of proceeding leads to a conception of the guilty mind, which is based upon the whole character of the prisoner, and this conception forms the foundation of a conclusion upon which it often depends whether the prisoner is to be punished or not. Here someone, perhaps, may object that, according to the famous saying of Franz v. Liszt, the founder of modern German Criminology and one of the originators of the *Internationale Kriminalistische Vereinigung* (IKV), the maxim is in force in any case: "The actor, not the act, is to be punished." But Liszt, in this often attacked and frequently misapprehended saying, intended to state only the opinion that every counteraction against crime on the part of the State, whether it be designated punishment, preventive measure, educational treatment, etc., must deal not only with the particular isolated action, but adapt itself to the whole individuality of the wrong-doer. Hence it follows that the dictum of Liszt refers solely to the method of counter-action (*i.e.* the problem how the State has to deal with the convicted offender), and not to the question, whether the prisoner has committed something punishable at all and, therefore, whether he is to be subjected to any kind of treatment on the part of the State. It is just this second point, the question of guilt, not of punishment, which is closely connected with the problem of *dolus eventualis*.

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[1] See v. Hippel, *Die Vorstellungstheorie* (in: *Festgabe der Göttinger Juristen-Fakultät für Ferdinand Regelsberger*, Leipzig, 1901), and the same writer in the *Vergleichende Darstellung Allgemeiner Teil*, vol. iii, pp. 491 *et seq.*

[2] See *e.g.* RGSt 33, p. 4; 46, p. 227; 59, p. 2; 67, p. 424.

Element of Knowledge.—Another difficulty arises from the fact that the prevailing opinion and the courts have neglected too much the element of knowledge in relation to the element of will (Einwilligungstheorie as contrasted with the Wahrscheinlichkeitstheorie). It frequently happens that the doer, though he had foreseen the evil result, not as a certainty, but as a strong probability, yet, nevertheless, put all his eggs into one basket and committed the act. If he had known positively that such a result would take place, he would, of course, have abstained from acting, because such an issue might cause only harm to himself. Despite the high percentage of probability of such a result, the species of guilty mind in these cases is stated to be only negligence. A few examples may perhaps be permitted for the sake of clearness.

At a shooting competition a competitor wins a pound if he hits an object which is held by an employee of the manager. A man takes part in the competition, well knowing that, being a very bad shot, he will probably miss the mark and hurt the employee. Could he positively foresee that event, he would not participate in the competition, for, in that event, he would, instead of gaining the prize, only lose his stake. Regarding such an issue, however, as unlikely, even as probable, he risks the small stake. The endangering of the employee's bodily health is unimportant for him. According to the formula of Frank this act may be only a case of negligence which, it is true, is punishable, but more leniently (see § 230 StGB). The difference between the latter case and the above-mentioned seduction case is that the clumsy shot, if things go badly, has no reward in view, whilst the actor in the seduction case could indulge his sexual desire even if the girl was younger than sixteen. Thus in the seduction case the form of mens rea is *dolus eventualis*, in the other case only negligence. This discrimination is unsatisfactory also because the motives, which would have restrained the actor in the shooting case from taking part in the competition, would have been purely selfish.

Another example which is borrowed from a recent decision of the Reichsgericht : The manager of a bank has thoughtlessly allowed X, a customer of the bank, to have too large an overdraft. The money being in danger of loss, the manager is induced by X to grant him another overdraft in order to enable X to recover the whole sum lent by the bank. The manager is aware that only a miracle can save X's financial situation and that the second loan will probably be lost too. But if he were able to foresee that event positively, he would not grant the second loan, because his own responsibility towards the bank would be aggravated the greater the loss became. In his desperate position he advances the money, hoping for a miracle. The Reichsgericht had to answer the question, if in such a case § 266, No. 2 StGB (so-called Bevollmächtigtenuntreue, breach of faith committed by a trustee) in the formulation which was in force till the statute of May 26, 1933 (Art. I, No. 18) was applicable.[1] The Reichsgericht, in its decision published in RGSt 61, p. 211, answered this question in the affirmative, giving the following reasons :

> It was an extremely speculative business, the prisoners, like gamblers, having staked all in one venture. They did so, risking possible failure and the loss, too, of the last 300,000 Marks, since exposure of even the loss they had already sustained would have cost them their positions. They acted knowing that failure might result ; but they were also disposed to take the risk ; so they acquiesced in this possible result. That is a sufficient reason for assuming that they intentionally disposed of a debt to the disadvantage of the savings bank according to § 266, No. 2 StGB.

And, similarly, the later decision RGSt 66, p. 255, says (with reference to § 312 Commercial Code, which is a special case of § 266 in the sphere of the Company Law) :

> In business life it frequently happens that a manager enters into a transaction knowing that he is risking something, but, nevertheless, he does so, with every intention of making profit for his firm from the transaction. Later on, however, when, instead of the expected profit, there ensues ever-increasing losses, he seldom breaks off the business relations in question. But henceforth his freedom of action is limited by his apprehensions ; he fears a rupture of relations and an exposure of his ineptitude with evil consequences to himself—loss of promotion, of property, of credit. It may be, it is true, that in such cases, too, the manager may cherish the feeble hope that a happy combination of circumstances quite contradictory to all practical experience may simultaneously save his firm from loss and himself from danger. Such a state of mind, nevertheless, does not exempt the manager from responsibility for the loss to the firm which he had foreseen. It would be an intolerable enfeeblement of the protection afforded to the property of the principal by the statute which punishes a breach of faith, if, in consequence of a too narrow interpretation of the mens rea, the manager were to be permitted to undertake, unpunished, a business which he knows to deviate very far from the standard of honesty of a conscientious merchant, to take a tremendous risk, with only the slightest of prospects of a favourable issue.

This decision is perfectly correct from a practical point of view. A person speculating with the property of another in such a frivolous manner deserves punishment, no matter whether or not he " conditionally acquiesced " in the possible loss to the other. It was a characteristic symptom of the strange mode of thinking here and there after the war that in § 314 of the Draft Criminal Code, 1925, it was proposed that *dolus eventualis* ought not to be a sufficient reason for punishing a breach of faith, for the odd reason that it was " a fault already well known under the regime of the present law that conscientious and dutiful persons refuse their co-operation in the case of dubious and complicated affairs." From my point of view that is no fault at all, and I therefore opposed this proposal of the Draft Code with the following argument: "It is just the fact that during the last few years certain occurrences have taken place in public life that makes it entirely inadequate to allow a person to go unpunished who knows that he acts contrary to his duty (*e.g.* disposes of public funds for purposes other than those for which they were destined and contrary to instructions given to him), but who thinks a loss caused to his principal by such an action to be not certain, but only possible."[1] The next Draft Code, published in 1927, agreed with this point of view, and so does the *Gesetz zur Abänderung strafrechtlicher Vorschriften* of May 26, 1933. The latter, giving a new formulation of the whole statute of Untreue, says in Art. I, No. 18: "Any person who vorsätzlich abuses the authority, given to him by law, order or by a private title, to dispose of another's property or to enter into an engagement on behalf of another and, by so acting, damages the aforesaid person, shall be guilty of Untreue and be punished by imprisonment and fine." Since the statute speaks only of Vorsatz, *dolus eventualis*, according to the principles mentioned above, is sufficient. In addition to this, the *dolus eventualis* need cover only the abuse of the authority, not the damage caused by the abuse.

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[1] § 266, No. 2, worded as follows, formed one of the most difficult parts of the whole StGB : " The following persons shall be punished for breach of trust by imprisonment with labour, with which the sentence may include the forfeiture of civil rights : Persons acting under a power of agent, who intentionally make arrangements with regard to rights or other property belonging to the persons who gave the power of agent, to the disadvantage of the same " (I utilize the translation given by Drage).

Although, therefore, the decision of the Reichsgericht is, as to the result, satisfactory, nevertheless it is scarcely reconcilable with the formula of Frank and the whole Einwilligungstheorie. The Reichsgericht, in order to maintain this judgment, has evidently been compelled to undervalue the psychological aspect of the case. For one would hardly be warranted in saying that the accused manager really agreed (if only conditionally) or contemplated such a result as the loss of the second loan, or in maintaining that he would have acted in the same way had he positively foreseen this result. Though it may be true that the exposure of the loss which already had occurred would have cost him his position, he certainly knew that the loss of the second loan must inevitably make things much worse for him. By no means, therefore, did he acquiesce in the latter result, and, had he positively foreseen it, would not have advanced the money. According to the Einwilligungstheorie the prisoner ought to be acquitted; for he had not acquiesced, even conditionally, and a breach of trust due to negligence is not punishable. An acquittal, nevertheless, seemed to be intolerable. Not feeling inclined to drop the Einwilligungstheorie,[2] the Reichsgericht states that the prisoner had in reality agreed to the result.

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[1] See my contribution to the compilation: Aschrott-Kohlrausch, *Reform des Strafrechts*, 1926, p. 359.

[2] That may be due, perhaps, to the so-called "horror pleni" of the Reichsgericht, *i.e.* the aversion of the Supreme Court to occasion a decision of its plenum which, according to § 136 of the Gerichtsverfassungsgesetz, is the preliminary condition for a deviation from a former decision. In a decision dated December 14, 1933 (RGSt 67, p. 424), the Reichsgericht still emphasizes the necessity of the actor's

Degrees of Guilty Mind.—In the science of German Criminal Law there has been also in the last decade, as there was, now and then, even before that, a turning away from the Einwilligungstheorie and a strong inclination towards the Wahrscheinlichkeitstheorie. Among the first of these writers it was the late Viennese Professor Löffler, already quoted above, who opposed the Einwilligungstheorie.[1] Proceeding from the thesis that—in contradiction to the Roman law—the guilty mind is not necessarily a matter of volition, he proposes to replace the present bipartition (*dolus* and *culpa*) by the following tripartition : (i) A certain result is desired, no matter to what ultimate result it may lead : this he designates as Absicht ; (ii) the result is foreseen without being desired : this he regards as Wissentlichkeit (consciousness) ; (iii) the result, though neither desired nor foreseen, might have been foreseen and avoided: a case of Fahrlässigkeit (negligence), *i.e.*, of course, unconscious negligence.

Löffler proposes, therefore, to formulate three degrees of guilty mind : (i) the strongest degree includes the Absicht and the most serious cases of Wissentlichkeit ; (ii) the middle degree includes the average cases of Wissentlichkeit ; (iii) the lowest degree includes the slightest cases of Wissentlichkeit as well as the whole class negligence. So Löffler succeeds in brushing aside the difficult and rather useless differentiation between *dolus eventualis* and conscious negligence, these two classes being covered by the conception Wissentlichkeit. Another well-known writer, Sauer,[2] objects to the formula of Frank (" if the actor had acted even when he had foreseen the obnoxious result positively ") on the grounds that it confuses law and morals ; furthermore, he declares that a person who acts knowing the obnoxious result to be very probable, but without acquiescing in this result, must be pathological. Sauer himself proposes to assume Vorsatz when the actor thinks the occurrence of an unfavourable result to be more probable than its non-occurrence ; otherwise and when the chances are of equal probability it shall be deemed negligence.

Fahrlässigkeit.—(4) As to the lowest degree of mens rea, the Fahrlässigkeit, and its differentiation from *dolus eventualis*, the essential facts have already been stated. Here I may be permitted to add only a few remarks as to the essence of the conception Fahrlässigkeit and its distinction from acts which are casual and innocent.

acquiescing in the result. But its arguments are so strongly buttressed by clauses that an old exponent of the Wahrscheinlichkeitstheorie, Klee (who is a member of the recently appointed Committee for drafting the new Criminal Code) already sees in this decision a victory of the latter theory. Klee, in his footnote to the decision (in *Juristische Wochenschrift*, 1934, p. 426), says : " The Reichsgericht, in this decision, in contradiction to many other decisions, does not demand that the actor, having realized the probable result, has, nevertheless, acted *and, moreover*, acquiesced in that result. It declares rather the conscious acting, despite the probability of the result, when the actor knows that the latter is a necessary consequence of such an action, to be itself such an acquiescence. In a sound practice of the courts the ' Vorstellungstheorie ' always will be triumphant."

[1] *Schuldformen des Strafrechts*, pp. 5 *et seq.*

[2] Wilhelm Sauer, *Grundlagen des Strafrechts*, 1921, pp. 619 *et seq.*

In consequence of the absence of the will in cases of offences due to negligence there are many doubts raised in German literature as to the question whether Fahrlässigkeit is a species of mens rea at all. With reference to this problem Hälschner,[1] a follower of Hegel, asked "whether and in what respect the thinking of a person has a moral meaning so that even a moral claim may be laid to the will with regard to the manner of thinking." And, even prior to that, Feuerbach "had made the imposing but futile attempt to trace back not only the *dolus*, but also the *culpa* to a conscious defect of the will, *viz.* the conscious breach of the obligation to use due care."[2] He thus seeks to escape the inconsistency of the whole doctrine of mens rea, "an inconsistency caused by the fact that the German doctrine of Criminal Law takes the mens rea entirely as a defect on the side of the will and, nevertheless, is forced to treat the Fahrlässigkeit as a species of mens rea. Therefore, Feuerbach, according to a remark of Binding,[3] "converts offences due to negligence into crimes of conscious omission." This explanation, however, being, moreover, applicable only to the conscious negligence, must logically lead to the result that Fahrlässigkeit would not be a species of mens rea adapted to the individuality of the particular offence, but an independent offence in itself. There would no longer be such offences as killing, wounding, burning, etc., due to negligence, but only a single offence, Fahrlässigkeit. Furthermore, it would then be necessary to draw the logical conclusion that this offence must be punished always according to the same Strafrahmen (*i.e.* the degrees of culpability between the highest and lowest punishment which the statute in question admits), graduated only in conformity with the degree of Fahrlässigkeit, but irrespective of the kind and gravity of the damage. German Criminal Law has not adopted this method[4] because it was deemed inadvisable to divorce the punishment of negligent actions entirely from the result. The fact that negligent actions are punishable is a remnant of the old Erfolghaftung, in so far as even the most negligent act as a rule goes unpunished (save under the few statutes which punish acts which merely endanger the safety of others) when, thanks to a lucky chance, it has not done any harm. There is no punishment for a negligent attempt, and many writers even think such an attempt to be logically impossible. The question wherein the real element of guilty mind in the Fahrlässigkeit, especially in an unconscious case of Fahrlässigkeit, consists is usually to be answered by charging the actor not with a volition as to the particular result, but with showing, contrary to his duty, a disregard for another person's rights.[5] Against the latter theory there have been raised mainly two objections: Firstly, it has been said that such a disregard is not an essential in all cases of negligence; secondly, that this construction—as in the above-mentioned formula of Frank—leads to a punishment not for the isolated action, but to one based upon the whole individuality of the wrong-doer; for disregard of another person's rights is an attribute of character.[1] It is not so much for the theoretical construction as for the practical treatment of the Fahrlässigkeit that the modern psycho-analytical science is important. Freud's doctrine concerning the so-called Fehlleistungen, as I have shortly emphasized in my contribution to the *Frank-Festgabe*,[2] has not been sufficiently utilized in the matter of criminal negligence, although it is just in this sphere that it may be able to throw some light. No other psychological doctrine has done so much in investigating those unconscious happenings in the mind of the actor which play such an important part in many cases of negligence.[3]

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[1] Hälschner, *System des preussischen Strafrechts*, 1858, part i, p. 150.

[2] Landsberg in Roderich Stintzing's *Geschichte der deutschen Rechtswissenschaft*, s. iii, 2 vol. (1910), p. 122.

[3] Karl Binding, *Die Normen und ihre Übertretung*, vol. ii (1877), p. 144.

[4] There is in the present law only a single offence of Fahrlässigkeit, viz. § 21 of the *Reichspressgesetz*, dated May 7, 1874 (see the author's *Pressrecht*, vol. xxiia of the *Enzyklopädie der Rechts- und Staatswissenschaft*, Berlin, 1927, pp. 71–2.

[5] See especially Franz Exner, *Das Wesen der Fahrlässigkeit*, 1910, pp. 223 *et seq.*

In the Criminal Code itself the discrimination between conscious and unconscious Fahrlässigkeit is entirely absent. Moreover, the differentiation does not mean that conscious Fahrlässigkeit must always be punished with more, and the unconscious Fahrlässigkeit with less, severity. On the contrary, a high degree of carelessness and thoughtlessness may appear as a more serious species of guilty mind than the fault of an over-anxious person who considers all possibilities, but who nevertheless acts in a wrong way.

Unknown to the German Criminal Law is also the differentiation between *gross* and *slight* negligence (*culpa lata* and *levis*, grobe and leichte Fahrlässigkeit), a discrimination which is familiar to the German Civil Law as well as to the English Criminal Law. Where Fahrlässigkeit is punishable at all, even a slight degree of negligence is sufficient. Punishment is, however, severer in cases of killing (§ 222 II) or wounding (§ 230 II), when the actor, on account of his public function, his profession or his branch of trade, is under an obligation to be especially careful with regard to the action in question.

It is doubtful in what way the limits of the conception of Fahrlässigkeit are to be marked in relation with the conception of chance. Two standards of Fahrlässigkeit are upheld, an objective and a subjective standard: according to the former an action is already fahrlässig when it is contrary to the behaviour of an ordinary, reasonable person, whilst according to the latter the action must be incompatible with conduct demanded from the actor personally having regard to his acquirements and capacity. The predominant doctrine and the Reichsgericht, in criminal matters, follow the subjective theory, whilst in Civil Law, as

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[1] See, for instance, Wilhelm Sauer, *Grundlagen des Strafrechts*, 1921, p. 584, and the author's *Der Massstab der Fahrlässigkeit im Strafrecht*, 1912, p. 28.

[2] *Fahrlässiger Falscheid* (Festgabe für Reinhard Frank, 1930), vol. ii, pp. 321–2.

[3] As to the theory of Freud, from the criminological point of view, *cf.* Alexander and Staub, *Der Verbrecher und seine Richter* (1929), and Jerome Michael and Mortimer Adler, *Crime, Law and Social Science*, 1933, p. 81 fn., and p. 119 fn.

§ 276 BGB prescribes, the objective theory is in force. The author, in his above-mentioned book, supported the objective theory (and it had been previously supported by v. Bar and Liepmann), for the decisive reason that a subjective standard here is a *contradictio in adjecto.* A standard of measurement must be outside the thing to be measured. How can one, in a particular case, know the individual capacity of the actor? Only by taking into consideration his actions. Yet to these actions also belongs the action which is now in issue, and it may show that the prisoner was not able to take care in a higher degree. That is probably why the Reichsgericht has really never treated the subjective standard seriously.[1] Nevertheless, it has, in recent years, become the custom of the Reichsgericht to emphasize the subjective standard in the hope that it might counterbalance the very wide conception of causality which the Reichsgericht applies. I cannot deal here with the part which is played in German Criminal Law by the conception of causation, and I must limit myself merely to pointing out that the criminal divisions (Strafsenate) of the Reichsgericht follow the so-called theory of the *conditio sine qua non,* which takes each condition, however remote it may be, for the cause of a result. The Reichsgericht believes that it can avoid unjust decisions, which otherwise might arise from this theory, by applying the subjective standard of the Fahrlässigkeit.[2] Another means to the same end is the following: As the Reichsgericht habitually says, the thesis, that the guilty mind need not include all the particulars of the concatination of facts, presupposes that even the unknown particulars are still within the sphere of common experience. The Reichsgericht, nevertheless, goes very far in fixing criminal responsibility, as the following example shows: " Through the unexpected collapse of a chimney, a certain man suffered a dislocation of his hip-joint. In order to deal with this injury it became necessary to give him an anæsthetic. During or after the narcosis parts of the contents of his stomach or mouth found their way into his lungs, producing there an inflammation from which developed gangrene of the lungs and resulted in the death of the man (so-called Schluckpneumonie)." The Reichsgericht approved the conviction of the responsible architect for killing, due to negligence, on the ground that the occurrence of Schluckpneumonie in consequence of narcosis, according to ordinary experience, is not unconnected with the collapse of a chimney; it thus declares that a responsible architect is bound to take into account the possibility of such a disaster when he erects a chimney in a careless manner.[3]

Überlegung in the Crime of Mord.—(5) Finally I have to mention a pecular species of mens rea which is to be found only in a single statute of German Criminal Law, the Überlegung in the crime of Mord (§ 211

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[1] See the quotations pp. 78 *et seq.* of my book, *Der Massstab der Fahrlässigkeit,* and many more recent decisions, *e.g.* RGSt 58, pp. 27 (30) and 134.

[2] For instance, RGSt 61, p. 320.

[3] *Jur. Wochenschrift,* 1927, p. 904, No. 21.

StGB). Mord is, accordingly, the killing of a person which is performed vorsätzlich and with Überlegung, whilst Totschlag (§ 212 StGB) means the killing which is performed also vorsätzlich, but without Überlegung. The requirement of Vorsatz, here as everywhere, signifies that the doer foresaw, and accepted, the killing of a person; Überlegung, however, according to the prevailing doctrine and practice, means the careful consideration of the arguments for and against the act. The prevailing doctrine thus requires an appeal to the will—"if or not," and not an appeal to the intellect—"how," which latter is concerned only with the manner of performing the action.[1] Here also, then, it is the element of will, and not that of knowledge, which plays the decisive rôle. Furthermore, the Überlegung must be present at the moment of the act; killing which is planned with, but executed without, Überlegung is only Totschlag, not Mord. This requirement, as a matter of course, narrows very considerably the scope of § 211, safeguarding from the penalty of death many cases which, from a reasonable standpoint, might deserve the maximum punishment. To avoid the latter consequence, the Reichsgericht is accustomed to emphasize that even a strong mental emotion at the moment of the action does not necessarily preclude Überlegung. The most important thing, declares the Reichsgericht, is "whether the actor, nevertheless, always exercised control over his thinking, his volitions and his actions, so that during the act itself he was not driven solely, or at least not predominantly, by his excitement and sentiments, but was able to follow, and did, in fact, follow, reasonable conceptions and considerations."[2]

[1] See, however, Gerland, *Lehrbuch des Strafrechts*, 1 ed., p. 357.

[2] RGSt 62, p. 196.

[*To be continued*]

SALVAGE AND COLLISIONS OF AIRCRAFT—DRAFT CONVENTIONS.

We have been given the opportunity of publishing the unofficial English text of the two draft conventions which appear below. These conventions have been drawn up by a sub-committee of the Comité International Technique d'Experts Juridiques Aériens (commonly known as the C.I.T.E.J.A.), and provisionally approved at the plenary meeting of that body held in Berlin in September last. These " bills " will be " read a second time " at the meeting of the C.I.T.E.J.A. appointed to be held at Lisbon in the autumn of next year. Their ultimate destiny, if they meet with favourable reception, is to be ratified by the several governments (including the British) which are parties to the C.I.T.E.J.A., and translated into municipal legislation. Meanwhile those of our readers who may feel disposed to offer criticisms are invited to communicate them to the senior British delegate on the C.I.T.E.J.A., Sir Maurice Amos, K.C., Goldsmith Building, Temple.

Draft Convention for the Unification of Certain Rules Relating to the Assistance and Salvage of Aircraft.

Art. 1.—The High Contracting Parties agree to take the necessary measures to give effect to the rules established by this Convention.

Art. 2.—(1) Every person exercising the functions of commandant on board an aircraft is bound to render assistance:

(*a*) to every person found at sea in danger of being lost;

(*b*) to every person who being on board an aircraft is in danger of being lost, or who is in danger of being lost in whatever place he may be, in consequence of a mishap to an aircraft;

in so far as it may be possible for the aircraft to proceed to the place without serious danger to itself, its crew, its passengers or other persons, with a prospect of rendering effective help.

(2) This obligation arises only if the aircraft is on a journey or ready to start.

(3) Every master of a vessel is bound, subject to the conditions defined in paragraph (1), to render assistance to every person found at sea in danger of being lost on board an aircraft or in consequence of a mishap to an aircraft.

(4) The obligation to render assistance ceases so soon as the person bound thereby ascertains that assistance is ensured by other persons as well or better placed than himself to render it.

(5) No liability rests upon the owner of a vessel or the operator of an aircraft as such, by reason of the non-observance of this obligation, except in the case where its non-observance has been due to his order.

Art. 3.—(1) Assistance given pursuant to the obligation defined in the preceding article creates a right to indemnity in respect of proper and necessary expenses justified by the circumstances, as well as in respect of losses sustained in the course of the operations.

(2) If assistance has been rendered spontaneously without obligation to give it, the person so acting is entitled to be indemnified only if he has been successful in saving life or has effectively contributed to the salvage.

(3) The indemnity is payable by the operator of the aircraft, or the owner of the vessel assisted.

(4) The indemnity shall not exceed the sum of 125,000 francs for each person saved, or, if there has been no property salved the total sum of 125,000 francs. These sums shall be taken to refer to the French franc consisting of 65½ milligrammes gold of millesimal fineness 900. They may be converted into the respective national currencies in round figures.

The indemnity shall not in any case exceed the value of the aircraft before the accident, such value being calculated at the rate of 250 francs per kilogram of the weight of the aircraft. By the weight of the aircraft is meant its weight with total maximum load as indicated in the certificate of airworthiness or other official document.

Art. 4.—(1) Assistance to or salvage of an aircraft or its cargo creates a right to remuneration which shall be fixed on the basis of the following considerations:

(*a*) Firstly, the measure of success obtained, the efforts and merits of the salvors, the danger run by the salved vessel or aircraft, by her passengers and her crew, by her cargo, by the salvors, the time expended, the expenses incurred and losses sustained and the risks of liability and other risks run by the salvors, the value of the property hazarded by the salvors, due regard being had to the special appropriation, where it exists, of the salvor's property for salvage purposes;

(*b*) Secondly, the value of the property salved.

(2) Provided that if the person who has effected the operations of assistance and of salvage is entitled to an indemnity in pursuance of the provisions of Article 3, there shall be deducted from the remuneration [payable under the preceding paragraph] the amount of the indemnity to which such person is entitled in respect of his expenses and losses.

(3) The remuneration payable shall in no event exceed the value possessed by the property salved at the close of the operations of assistance and salvage.

(4) When the assistance or salvage has been effected by several persons, in sharing the remuneration among them regard shall be had to the considerations expressed in paragraph (1) of this Article.

(5) The like rules shall be applied to the case of the assistance or salvage of a vessel or its cargo by an aircraft.

Art. 5.—In the case where assistance and salvage is rendered both to persons and to an aircraft or its cargo the salvor of the persons is entitled to a fair share of the remuneration awarded for the assistance and salvage of the aircraft or of its cargo, without prejudice to his right to the indemnity to which he is entitled under Article 3.

Art. 6.—(1) No indemnity or remuneration is payable if the assistance has been rendered or the salvage effected in spite of its express and reasonable rejection by the person assisted or salved.

(2) The court may deprive the persons who have performed the operations of assistance or salvage of all indemnity or remuneration or may award a reduced indemnity or remuneration if it appears that such persons have by their fault rendered the salvage or assistance necessary or that they have been guilty of theft, fraudulent concealment or other fraudulent acts.

Art. 7.—The remuneration due in respect of operations of assistance or salvage is payable by the operator of the aircraft or by the owner of the vessel without prejudice to his right of recourse, if any, against the owners of the property salved.

Art. 8.—Neither in calculating the remuneration due, nor for the purpose of determining rights of recourse, are the personal effects or baggage of the crew or of the passengers or objects carried under the provisions of the postal conventions to be regarded as property salved.

Art. 9.—(1) Actions for the payment of indemnity or remuneration shall be barred after an interval of one year from the termination of the operations of assistance or salvage.

(2) The manner of calculating the said period of limitation, as well as the grounds upon which it may be suspended or interrupted, shall be determined by the law of the court where the case is tried.

Art. 10.—Every agreement as to salvage entered into at the time and under the influence of danger may at the request of either party be annulled or modified by the court if it considers that the conditions agreed upon are not equitable, and particularly when the remuneration is in proportion to the services rendered in an excessive degree too large or too small.

Art. 11.—Jurisdiction over actions for the payment of indemnity or remuneration may be exercised in the territory of each High Contracting Party, at the choice of the plaintiff, by the judicial authority of the defendant's domicil, by that of the place where the operations of assistance and salvage were effected, or (if there has been an arrest of the aircraft or of the cargo salved) by the judicial authority of the place where arrest was effected.

Art. 12.—By the term " operator " of the aircraft is meant any person who has the aircraft at his disposal and who makes use thereof for his own account.

If the name of the operator is not inscribed in the aeronautical register or some other official document, the owner is to be deemed the operator until proof to the contrary.

Art. 13.—This Convention is applicable to government aircraft, including military, customs, and police aircraft, except that the provisions of Article 11 shall not apply to any government aircraft; and that the provisions of Article 2 relating to the obligation of assistance and of salvage shall not apply to military, customs, or police aircraft.

Art. 14.—This Convention is applicable with respect to each of the High Contracting Parties in every case in which the aircraft or vessel which has rendered or received assistance is registered in the territory of another High Contracting Party.

DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO AERIAL COLLISIONS.

Art. 1.—The High Contracting Parties agree to take the necessary measures to give effect to the rules established by this Convention.

Art. 2.—(1) By an aerial collision is to be understood any collision which takes place, from any cause whatsoever, between two or more aircraft in motion.

(2) Any damage or injury caused by an aircraft in motion to another aircraft in motion, or to persons or property carried thereon, is deemed to be damage or injury resulting from a collision, even when there has been no actual contact.

Art. 3.—(1) The compensation due for damage or injury caused by an aerial collision is payable in accordance with the provisions of the following articles, by the operator of the aircraft.

(2) By the term " operator " of the aircraft is meant any person who has the aircraft at his disposal and who makes use thereof for his own account.

If the name of the operator is not inscribed in the aeronautical register or some other official document, the owner is to be deemed the operator until proof to the contrary.

Art. 4.—(1) If the collision is caused by the fault of one of the aircraft, the liability to make good the damage or injury caused to the other aircraft, or to the persons or property carried on either of the aircraft in collision, attaches to that one which is in fault.

(2) This liability is limited:

(*a*) In respect of damage caused to the aircraft not in fault, to the value of the aircraft in fault, such value being calculated at the rate of 250 francs per kilogram of the weight of the aircraft. By the weight of the aircraft is meant its weight with total maximum load as indicated in the certificate of airworthiness or other official document. Provided, however, that the limit of the liability of the operator shall not be less than 600,000 francs nor more than 2,000,000 francs. These sums shall be taken to refer to the French franc, consisting of 65½ milligrams of gold, of millesimal fineness 900. They may be converted into the respective national currencies in round figures.

(*b*) In respect of injury caused to persons, and damage to property, carried for any titles whatsoever on the aircraft in collision, to the compensation provided for such injury or damage respectively by Article 22 of the Convention signed at Warsaw on October 12, 1929, for the unification of certain rules relating to the international carriage by air of passengers, luggage and goods.

(*c*) Provided that the total compensation due for damage or injury to the aircraft not in fault or to persons and property carried thereon shall not exceed the value of the aircraft [in fault] as fixed in paragraph 2, subsection (*a*) of this Article.

(3) If several persons have suffered injury in the same accident, and if the total amount to be paid by way of damages would exceed the limits laid down in paragraph 2, subsection (*c*) of this Article, the rights of each such person shall be proportionately reduced so that the total damages shall not exceed the said limits.

Persons who have suffered injury in the same casualty must assert their rights or notify their claims to the operator before the expiration of six months from the day on which the casualty occurred.

So soon as this period of time has expired, the settlement of the indemnities may be validly proceeded with ; interested parties who have allowed the said period to expire without asserting their rights or notifying their claims may thereafter exercise their rights only as against the amount which has not been distributed.

(4) The operator may not avail himself of the provisions of this Article limiting his liability, if it is proved that the collision was caused by his gross negligence or wilful misconduct, or by such negligence or misconduct on the part of his servants or agents, except where he proves that the collision was caused by negligent pilotage, or by negligence in the handling or navigation of the aircraft, or, where his servants or agents are concerned, that he has taken all proper steps to avoid the collision.

Art. 5.—(1) If the collision is due to the fault of both parties, the liability of each aircraft for the damage or injury done to the aircraft, or to persons or property carried thereon, shall be proportionate to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

(2) The limits of liability prescribed in the preceding Article remain applicable.

(3) The liability of aircraft which have collided in consequence of the fault of both parties in respect of damage or injury caused by the collision

to persons or property carried thereon is joint and several; provided that if one party pays a larger amount than that for which, under the provisions of the preceding paragraphs, he is finally liable, he is entitled to recourse against the other party.

Art. 6.—If the collision is due to inevitable accident or to *force majeure*, the damage or injury done to the aircraft in collision or to the persons or property carried thereon shall be borne by those who have suffered the same.

Art. 7.—(1) In the case of damage or injury caused on the surface by two or more aircraft in collision, the operators of such aircraft shall be jointly and severally liable to the third parties who have suffered such damage or injury, each of them [severally] being liable subject to the conditions and within the limits of his liability to third parties on the surface.

(2) The apportionment of the liability, as between the aircraft in collision, shall be determined on the following principles, but shall always be governed by the limits referred to in the preceding paragraph.

(*a*) If the collision was due solely to the fault of one of the aircraft, that aircraft shall alone be liable;

(*b*) If the collision was due to the fault of both aircraft, the liability shall be apportioned in accordance with the rule laid down in Article 5 of this Convention;

(*c*) If the collision was due to accident or to *force majeure*, the liability shall be apportioned in proportion to the limits of the liability of the aircraft respectively, as provided by Article 4, paragraph 2 (*a*) of this Convention.

(3) If, by reason of his joint and several liability the operator of one aircraft has paid to the persons who have suffered damage or injury on the surface a sum exceeding that with which, in accordance with the provisions of paragraph 2 of this Article, he is properly chargeable, the recourse which that operator shall have against the other aircraft concerned shall be only within the respective limits of the liability of each such other aircraft to third parties.

Art. 8.—(1) Every person exercising the functions of commandant on board an aircraft which has been in collision is bound (independently of such obligation as may be incumbent upon him to go to the rescue of persons) to render assistance to the other aircraft concerned, provided that he can do so without serious danger for himself, his passengers or other persons.

(2) Such commandant is likewise bound, if possible, to make known to the other aircraft concerned the registration and nationality marks of his own aircraft as well as the place from which he has come and the place to which he is going.

(3) He must also report the casualty to the authorities of the territory within which the collision has occurred, and give them all such information as they may require. If the collision occurred on the high seas, the report must be made to the authorities at the first place of landing.

Art. 9.—Jurisdiction over actions for damages caused by an aerial collision may be exercised, in the territories of the High Contracting Parties, at the choice of the plaintiff;

(*a*) by the judicial authority of the defendant's domicil;

(*b*) by that of the place where the collision occurred; or

(*c*) if there has been an arrest of one of the aircraft in collision, by the judicial authority of the place where such arrest was effected.

(2) If the defendant is not domiciled in any one of the Contracting States, and if the collision took place outside the territory of those States, jurisdiction may be exercised by the judicial authority of the place where any one of the aircraft in collision is registered.

(3) If different persons claiming to have suffered damage or injury take proceedings under the preceding Articles before jurisdictions in different countries, the defendant shall be entitled in each jurisdiction to claim that account shall be taken of all such concurrent claims, in such a manner as to preclude the limits of his liability being exceeded.

Art. 10.—(1) Actions for damages caused by an aerial collision shall be barred after an interval of one year from the day on which the damage or injury was caused. If the person claiming to have suffered such damage or injury proves that it was impossible for him to learn of the damage or injury, or the identity of the person liable therefor, the period of limitation shall begin to run from the day on which it was possible for him to be so informed.

In any event such actions shall be barred after an interval of three years from the day on which the damage or injury was caused.

(2) Actions in recourse authorized by the preceding articles shall be barred after an interval of one year from the day of payment.

(3) The manner of calculating the said periods of limitation, as well as the grounds of suspension and interruption, shall be determined by the law of the court before which the case is tried.

Art. 11.—This Convention is applicable to government aircraft other than military, customs and police aircraft.

Art. 12.—(1) This Convention is applicable in all Contracting States:

(*a*) when the collision has taken place in the territory of any one such State and provided that one at least of the aircraft in collision be registered in such a State.

(*b*) wherever the collision has taken place, provided that all the aircraft be registered in the different Contracting States.

(2) The expression "territory" of a Contracting State shall, for the purposes of this Convention, be deemed to include any territory subject to the sovereignty, the suzerainty, the protectorate, the mandate or the authority of such Contracting State, for which such Contracting State is a party to this Convention.

[Formal clauses to follow]

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Report of the Joint Committee on Indian Reform.—On the whole, the eagerly expected report of the Joint Committee, to which the proposals of the Government were last year submitted for consideration, contains no surprises. The Committee naturally was so constituted as to include a definite majority who were known to approve the general line of governmental policy, and the refusal of Mr. Churchill and others to take part in what they deemed to be a fruitless undertaking deprived the representation of opposition views of much of their weight. The Committee deserves full recognition for the care with which it has probed the situation, and it is naturally a matter of gratification to its authors that the White Paper policy has emerged virtually intact. On the other hand must be placed the fact that the Labour representatives on the Committee definitely proposed very much more far-reaching concessions, a fact which renders it unlikely that the measures adopted by the Government as adequate will be regarded in India as closing for the time being the constitutional controversies. The success of the Congress party on its re-entry into the Indian political field at the elections for the central legislature points to the same conclusion.

The Additional Safeguards.—The line adopted by the majority is naturally an effort to increase the safeguards for the maintenance of ordered government and the protection of minorities and of British commercial interests. The proposal to exclude control of the police from the ministry in the provinces is definitely negatived as inconsistent with the existence of responsibility; but it is suggested that (*a*) the consent of the Governor given at his discretion should be required to any legislation affecting police Acts and to any rules made thereunder affecting the discipline or organization of the police; (*b*) records of the Intelligence Department relating to terrorism should not be disclosed outside the police force except to such public officers as the Governor may direct[1]; (*c*) for the purpose of combating terrorism the Governor should have the power to take under his own control any branch of government which it is necessary to use for that purpose. These provisions are essentially subject to the same criticism as has been addressed to the safeguards contained in the original proposals. If they are effectively to be put in force, the Governor must exercise a measure of control over ministers analogous to that which he exercised under the dyarchic system, for sporadic intervention is impossible to carry out with any success. If, on the other hand, it is not intended that they shall be put in operation, they serve merely to irritate and therefore should not be inserted. The best argument that can be adduced in their support is that lack of political experience in India renders it necessary to supply an external check to replace that exercised in the United Kingdom by the operation of political traditions; but it is difficult to see how any external machinery can effectively supply what is wanted, especially when the safeguards are not accepted even by moderate Indian opinion. Responsible government again demands that on ministers only should be imposed the duty of bringing to the Governor's notice matters affecting his special responsibilities; to impose such a duty on Secretaries[1] places these officers in a position really untenable, reflecting the stage of dyarchy and running counter to the fundamental principles of the new regime. In the field of commercial discrimination[2] the Committee proposes to add a fresh safeguard, the duty of the Governor-General to prevent the imposition of penal tariffs on goods imported from the United Kingdom. But it is clear that the Committee realizes in some measure the hopeless position of a Governor-General who had to face the wishes of a ministry supported by the legislature on an issue of this kind. It would be easy for the Government to countenance a boycott far exceeding in seriousness anything possible in the past under governmental opposition, and it would seem much better, if the will of the Indian legislature were to be thwarted, that it should be effected by the use of the power of disallowance. *Ex hypothesi* such an incident could happen only in the event of a bitter struggle between the representatives of the Indian people and the British Government, and in such a case the responsibility should rest with the British Government directly. In truth, however, the only real safeguard for British commerce lies not in the elaborate and probably unworkable clauses proposed to be inserted in the Act, but in the conclusion of an agreement based on reciprocity between India and the United Kingdom, and this the Committee seems more or less clearly to see.[3] It sacrifices, as is inevitable, the suggestion of protecting holders of British professional qualifications in their present favoured position, leaving the matter to reciprocity, and it thus points the way to the true solution. Unfortunately it is only too clear that, as in the case of Ceylon, there must arise at once an intensive propaganda in favour of the elimination of the reservations, and the Labour party's proposals are in this direction. The Committee favours the formal grant to the legislatures in India of the constitutional right after ten years to present to the British Government and Parliament recommendations for the amendment of the constitution on certain specified matters as to the composition of the legislature and franchise.[4] It is, however, clear that the Indian legislatures will not assent to the delay

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[1] Joint Committee on Indian Reform Report, i, 49–55.

[1] Report, i, 55–7.

[2] *Ibid.*, i, 204 ff.

[3] *Ibid.*, i, 211–12.

[4] *Ibid.*, i, 223 f.

proposed ; in any event they will assert much earlier the right to demand changes and in special to claim that the power to develop their autonomy shall be far more widely conceded.

The Legislatures.—There will be wide sympathy with the conclusion of the Committee against the recommendation of the White Paper in favour of the direct election of the lower chamber of the federal legislature.[1] This was a departure from the proposal of the Simon Report made in deference to the views of representative Indians, but from the first it seemed a hopeless project. The size of the constituencies necessary was prohibitive, and it is most desirable in the early days of federation to link the provinces closely to the federation by the grant of the right of election of members of the federal Lower House. It is equally satisfactory that Upper Houses are proposed for Madras and Bombay as well as for Bengal, the United Provinces, and Bihar. In all probability in these Upper Houses may be found more effective safeguards for the interests of the people than in the powers of the Governors.

The States and the Federation.—The basis of federation naturally remains the readiness of the States for the most part to adhere, a decision which evokes strong opposition from the Labour party representatives who adopt the view that, while the inclusion of the States is desirable, it would be proper to proceed with the grant of federal responsibility, even if the provinces only provided the units. The majority has accepted the view that the State representation must be strengthened artificially if it proves impossible to have almost full representation on the inauguration of federation ; if the States adhering do not provide 90 per cent. of the seats available for the States, then additional representatives should be appointed to the federal legislature to the extent of half the difference between the seats to which the federating States would ordinarily be entitled and the full State representation if all the States acceded.[2] The recommendation has the unfortunate effect of accentuating the artificial character of the federation, and the fact that the States are given a very generous representation, in part in order to secure in the federal legislature a definitely Conservative and non-democratic element to counteract the relative democracy of the representatives of British India. From the Labour standpoint this element is not essential, and in the same spirit the Labour minority's recommendations[3] contemplate the transfer forthwith to the Indian Ministry of the control of foreign relations proper as in the case of the Dominions. It is not, of course, suggested that the special relations arising between the Crown and the States which do not adhere to the federation, and those which adhere in respect of matters excluded from federal authority, should be transferred to the Ministry ; but it is clear that, if the vital and essential sphere of foreign affairs were made ministerial, the reservation of relations with the States to the Governor-General acting as Viceroy would become impossible. The conduct of the foreign relations of India involves necessarily ability to speak for India as a whole, and in the long run the Ministry would have to be allowed the right of controlling not merely the foreign relations of the States, but also the relations of the Crown with their rulers. On the other hand, the Labour minority admits[1] that control of defence cannot be surrendered so long as a British army must be maintained for the security of India, and it denies that defence and foreign affairs must be in the same hands. This, however, is a doctrine decidedly hard to accept, for it would be unsound in principle that the Ministry which determines foreign policy should be exempt from the responsibility of co-ordinating it with defence, and the Governor-General would be gravely embarrassed by his inability to control the foreign policy which might largely determine the necessities of defence.

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[1] Report, i, 109–11.

[2] *Ibid.*, i, 115.

[3] *Ibid.*, ii, 274, 275.

Legislative Power.—The most important alteration of the distribution of authority is that involved in the proposal to render explicit the uncontrolled power of the federation, and of the Governor-General when he exercises his personal legislative power, to pass enactments for the defence of India in the case of emergency which will override provincial legislation. This is a distinct improvement, for, though in Canada and Australia alike the courts accorded very wide powers in war to the federation,[2] no risk of any kind of invalidity should be run. It is, however, disappointing that the federal power is restricted in the case of external affairs by exempting from its ambit future agreements referring to matters within the exclusive powers of a unit, except in so far as they have been made with the previous concurrence of that unit.[3] The confusion which exists in Canada and Australia on this issue should have prevented the adoption of so unsatisfactory a power. The federation should also be given full legislative authority to secure the observance of any decision of the federal court. It may be held that this power is implicit, but it ought clearly to be expressed. It is unfortunate also that it is necessary to preserve the list of subjects of concurrent authority at its present length, and much confusion seems inevitable. The Committee[4] accepts as defensible the idea of appointing a time limit for the questioning of Acts on the score that they are *ultra vires* the legislature which has enacted them, but suggests that at least five years should be allowed. It seems that it has overlooked the provision in the Maltese Constitution[5] on this subject, which is rather obscure and open to different interpretations. But the whole idea has difficulties. If an Act is allowed thus to become beyond challenge, what is the position as regards amendment of clauses otherwise *ultra vires*? It might well be necessary to have change, and yet the alteration might be *ultra vires* the legislature, and the central legislature might refuse to make the alteration desired. It would almost seem necessary to allow the legislature which passed the original measure to make amendments to it, which should at once be beyond challenge as ancillary to provisions which by lapse of time cannot be impugned. The whole project, however, seems unsound ; in some State a law might easily be passed and remain unchallenged although wholly indefensible. It is doubtful also if it is wise to give to the Governor-General personally [1] the responsibility of directing provincial governments to secure the execution of federal laws ; if the law has been duly assented to, it is for Ministers to advise the action to be taken and the Governor-General would be placed in an invidious position if the directions are made a matter for his special discretion ; if a provincial government is overridden by the federation, responsibility should rest squarely with the Ministers responsible. In the same way, it is dubious if the Governor-General should be made personally responsible for orders to the States in matters within ministerial discretion. The States are to be federal units, and there is no logical distinction possible between them and the provinces in so far as their rulers accept federation.

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[1] Report, ii, 275, 276.

[2] Keith, *Constitutional Law of the British Dominions*, pp. 327, 354.

[3] Report, i, 151 (Item 8).

[4] *Ibid.*, i, 146, 330.

[5] Keith, *Journ. Comp. Leg.*, vol. xiv, pt. iv, p. 275.

The Judiciary.—The proposal [2] to allow federal judges to hold office until 65 in lieu of 62 seems of dubious value, and to disregard the effects of the Indian climate on mental vigour ; it is admitted that as a rule a man's best judicial work there is done by sixty.[3] It is doubtful also if it is wise to require that a judge may only be removed on a report of the Privy Council ; to exclude the possibility of removal on an address from the legislature seems unnecessary ; it would suffice to make it clear that action by the Crown on such address would be discretionary. Moreover, power to suspend a federal judge accused of misbehaviour should certainly be granted to the Governor-General pending consideration of charges by the Privy Council. It seems also desirable that appeal should lie to the Privy Council from advisory judgments of the federal court, and consideration might be given to the suggestion that judgments on such appeals should bind all Indian courts ; the constitution of Northern Ireland affords a parallel provision. It should also be made clear that an appeal lies to the Privy Council when the federal court refuses to hear an appeal from a High Court on the ground that the sum involved does not reach the limit stipulated, to the extent that the Privy Council shall decide any controversy as to the interpretation of the limit.

The Separation of Burma.—The Committee advises that Burma be separated from India, and thus definitely helps forward a solution too long delayed. The case for separation is really unanswerable, and the objections to it are plainly merely tactical, being based on efforts to secure for Burma a Constitution more generous than that proposed by the British Government. The new Constitution suggested will have to include provision to secure the just rights of Indians domiciled in Burma and to prevent unfair treatment of Indian exports to Burma. The Governor-General in turn must be empowered to secure fair treatment for Burmese imports into India. The rights of Indians freely to enter Burma cannot, it is clear, be made obligatory, but a safeguard against abuse of rights is assured by requiring the prior assent of the Governor to legislation restricting Indian immigration. It will also be necessary in the Indian Constitution to safeguard the rights of companies, formed with the aid of United Kingdom capital and employing United Kingdom personnel but domiciled in Burma. Trade relations between Burma and India will fall to be regulated by agreement, and an important recommendation suggests that to the Governor alone should be given control over certain areas which hitherto have not been notified as backward tracts, but which in the opinion of the Committee should fall within that category.

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[1] Report, i, 122. For the Governor-General to refuse to act because Ministers have been "tactless or unwise" would involve a serious breach of constitutional government.

[2] Report, i, 193.

[3] *Ibid.*, i, 197.

Piracy Jure Gentium.—The value of the procedure of obtaining opinions of an advisory character under s. 4 of the Judicial Committee Act, 1833, is neatly illustrated by the decision as to the nature of piracy *jure gentium.*[1] The need of reference arose from a rather surprising decision of the Supreme Court of Hong Kong which ruled that armed Chinese nationals who pursued and attempted to attack a Chinese cargo junk were not guilty of piracy, because they were apprehended before they could effect any robbery. Very properly, no appeal against the acquittal being possible, the issue was referred to the Judicial Committee, whose view, inevitably, will govern any future case in Hong Kong and other colonies, though, being advisory, it does not strictly speaking rank as a judgment. The Committee was able without undue difficulty to decide that there was no authority binding it to hold that robbery was an integral part of the act of piracy. That view might be supported by *Dawson's Case* [2] and the American case of *United States* v. *Smith,*[3] but it was contrary to the view accepted in the case of *The Serhassan Pirates* [4] and *The Magellan Pirates* [5] and the American case of *The Ambrose Light.*[6] The decision is interesting, among other things, for an enumeration of the " sources of international law " in which State papers rank beside treaties, municipal Acts of Parliament, the decisions of municipal courts, and " last, but not least, opinions of jurisconsults or textbook-writers." Without entering into the disputed realm of the meaning of " sources " in this connexion,[7] it may be suggested that for " State Papers " should be substituted " international transactions as recorded in State Papers." A further point of value is the Committee's insistence on the fact that international law is essentially in process of growth and development so as to be applicable to the new situations which from time to time emerge.

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[1] [1934] A.C. 586.

[2] (1696) 13 St. Tr., 451.

[3] (1820) 5 Wheat. 153, 161, *per* Story J.

[4] (1845) 2 W. Rob. 354.

[5] (1853) 1 Spinks E. A. 81.

[6] 25 Fed. Rep. 408.

[7] Wheaton, *Int. Law* (ed. Keith), i, 210–23.

Irish Citizenship.—The Citizenship Bill of the Free State has evoked a marked conflict of opinion between the Secretary of State for the Dominions and Mr. de Valera as regards its purport and effect. It is, of course, clear that such a measure was urgently needed, for the definition of citizen in the Constitution is wholly inadequate. The measure provides for citizenship much on the lines of the provisions as to British nationality in the British Nationality and Status of Aliens Acts, 1914 to 1933, of the United Kingdom. Birth in the Free State area before or after December 6, 1922, confers citizenship, and the child of a natural-born citizen is also a citizen if his father was born within the State. Moreover, citizenship may be inherited from a father born outside the State, if the birth of the child is registered at an Irish legation or consulate in a foreign country or in the foreign births entry book kept by the Minister of External Affairs, and if the child on attaining age 21 makes a declaration of retention of citizenship and, if also a citizen of a foreign country, divests himself in accordance with its laws of his citizenship thereof. The power to naturalize is given, dependent on one year's continuous residence in the State prior to application, and four years' residence in the next preceding eight years. Innovations include the formal recognition that birth on State soil of children of persons possessing diplomatic immunity does not confer citizenship, and the doctrine that the nationality of a foundling shall be deemed to be Irish if it is found in the State. More important is the equalization of the rights of men and women and the abrogation of the doctrine that marriage automatically affects citizenship where a woman marries a non-citizen. Instead, facilities are provided for the acquisition of citizenship by the spouse of a citizen where the spouses are to reside within the State, while, where residence outside is intended, citizenship may be lost, but may be retained by an express declaration. Citizenship may be lost on acquisition of another citizenship after 21, or by declaration of alienage when a citizen is by birth or becomes before that age a citizen of another country.

Citizenship and British Nationality.—The measure ignores British nationality save in that it repeals the Acts of 1914 and 1918 if and so far as they ever were in force in the State. The effect of this provision[1] is disputed. Mr. Thomas has criticized the measure because it fails to make provision for the maintenance of what is known as the common status of subjects of His Majesty on the basis of common allegiance to the Crown, as contemplated in the conclusions of the Imperial Conference of 1930 relating to nationality, but states that he is advised that the Bill does not purport to and could not in any case deprive any person of his status as a British subject. It must be assumed from the fact that the statement was made in response to an inquiry as to the abolition of British citizenship within the Irish Free State that the Secretary of State is speaking of the law of the State and negatives the authority of the legislature to affect the status of a British subject therein, while Mr. de

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[1] Cf. *Journ. Comp. Leg.*, vol. xiv, pt. i, p. 107.

Valera is reported as stating that "no one in the State will be a British subject when this Bill is passed and becomes Irish law." This statement must clearly be understood as referring to the internal law of the State; clearly a person born in the United Kingdom who visits the State remains a British subject under international law, and would be so recognized even by Mr. de Valera. The question then arises whether the view of Mr. de Valera or that of Mr. Thomas is sounder in law, and certain conclusions are inevitable. (1) It seems clear that as introduced the Bill did purport to eliminate British subjecthood as a status in Irish law. The assertion of Mr. de Valera was supported by the express abolition of the Acts of 1914 and 1918, for it was certainly not the view of the Irish Government that by this step the common law was revived. Their view presumably was that under Art. 73 of the Constitution these statutes were introduced, superseding the Common Law, and with their repeal the whole fabric of British nationality is destroyed. But in any case on report the Bill was amended to eliminate the common law. (2) As regards one important class of British subjects the measure seems clearly to be effective. The Acts provide for the acquisition of British nationality by persons who are born out of the British Dominions, and who are certainly not by Common Law British subjects. Their British nationality depends on statute alone, and the Statute of Westminster, 1931, deliberately authorizes the legislature of the Free State to repeal British statutes. It seems, therefore, impossible to assert that such persons in the Free State can still be British subjects if the Acts under which they are made such subjects cease to be in force. To deny the Dominion power to legislate negatives the plain meaning and intention of the Statute of Westminster and the resolutions of the Imperial Conferences. (3) As regards persons born in the Free State and thus by Common Law subjects of the King there is more doubt. The bond of allegiance as giving a common status is since the Imperial Conference of 1926 the essential feature of unity in the Empire, and it may be argued that this bond cannot be severed by the action of one legislature only, but only by the combined action of all the Commonwealth legislatures or at least by the co-operation of the United Kingdom and Irish Free State Parliaments. Anything else, it may be argued, would be incompatible with the Treaty of 1921, to which the State owes its existence; the Treaty again is law paramount under the Constitution Act of 1922 enacted by the Constituent Assembly, and the revocation of that rule is invalid because the legislature of the Free State has no power to abrogate a rule enacted by the Constituent Assembly.[1] The issue, of course, has close affinities to the question of the claim of the Prime Minister of the Union of South Africa that the allegiance of the people of the Union can be severed by a simple Union Act. From the point of view of the Irish Free State the matter appears very differently. The whole legislative power is vested in the legislature, and it is for that body, representing the will of the people of Ireland, to determine whether under the law of the State there shall be any recognition of persons of Irish citizenship as British subjects. The common status is not denied as existing, but it is denied that it rests on allegiance. To decide on the validity of the conflicting claims there would be necessary an inter-imperial tribunal acceptable to both parties, and unfortunately the project of 1930 was left facultative, has never been made effective, and in any case would not have supplied the real desideratum, a court of the status of the Permanent Court of International Justice, suitably representative of the whole of the Commonwealth, charged with the decision *inter alia* of disputed issues arising out of the Statute of Westminster and the new status of the Commonwealth and its members.

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[1] Keith, *The Sovereignty of the British Dominions*, pp. 189 ff.; *Journ. Comp. Leg.*, vol. xv, pt. iv, p. 263.

Mutual Citizenship Rights.—Recognition in a certain degree of the common status still admitted as existent by Mr. de Valera is provided for in the measure, which gives effect to any convention, made before or after the passing thereof, providing for the enjoyment in the State by citizens of other countries of any of the rights of citizenship in the State on a basis of reciprocity. But the Executive Council is also authorized on a similar basis to extend part or all of the rights of citizens to citizens of countries which accord rights to Irish citizens, subject to such conditions as are imposed on Irish citizens in these countries, and this would permit the recognition of the effects of the common status without the necessity for the conclusion of a convention. It is, however, provided that right of ownership of a ship registered in the State may not be conceded unless a convention exists giving similar rights to Irish citizens in respect of foreign ships, but the Commonwealth Merchant Shipping Agreement, 1931, should meet this requirement. Much more obscure is the rule that no order of the Executive Council may confer on any person any right or privilege conferred by any Irish Act on any class or group of persons, whether defined as citizens or as nationals of the State or in any other manner whatsoever, of which such person is not at the relevant moment a member. Presumably this may operate to prevent the extension to British subjects outside the State of the franchise and other political rights as well as of rights under the Control of Manufactures Act, 1932, and similar legislation.

The Extent of Irish Free State Jurisdiction.—A very interesting discussion of the ambit of the jurisdiction of the Free State is to be found in the decision in *Keegan* v. *Dawson*[1] which is noteworthy for a sharp conflict of judicial views. The issue was a simple one. An employee of a race-horse trainer, normally resident like his employer in the State, where both were domiciled, was injured in England where he had been sent in charge of a race-horse. The question, therefore, arose whether the employee was under the Workmen's Compensation Act, 1906, entitled to be paid compensation, and it was contended that he was not, as the accident had occurred outside Free State limits. The High Court accepted this defence, adopting the view that the Act of 1906 must be regarded under Art. 73 of the Constitution as having been re-enacted for the Free State, and that, applying the normal rule of territorial limitation of legislation, it followed that the Act must not be interpreted as applying to such an accident. It noted the English rulings to this effect in *Tomalin* v. *S. Pearson & Son, Ltd.*,[1] and *Schwartz* v. *India Rubber, Gutta Percha and Telegraph Works Co., Ltd.*,[2] and the dictum of the Privy Council in *Krzus* v. *Crow's Nest Pass Coal Co., Ltd.*[3] The Supreme Court, however, declined to accept this reasoning, though the judges acted on different grounds. The simplest view was that of Murnaghan J. who adopted the principle that the Act of 1906, as continued in force by Art. 73, must be deemed not to be restricted in ambit, and to remain applicable, as it clearly was originally, to an accident occurring anywhere in the United Kingdom. But Kennedy C.J. and Fitzgibbon J. agreed in rejecting the doctrine of territorial limitation as relevant in a case where the parties were resident and domiciled in the State, the contract of service was made therein, and the bulk of the service was to be rendered there. Fitzgibbon J. stressed the view, often enunciated as in *The Zollverein*[4] and *Cope* v. *Doherty*,[5] which takes the criterion of the ambit of legislation to be the application to the subjects of the sovereign concerned. Needless to say, none of the judges countenanced the application to the Act regarded as an Irish Act of the theory of the limitation of Dominion legislation to territorial limits as a matter of constitutional law, for that doctrine has never been regarded in the Free State as applying to that territory.[6]

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[1] [1934] I.R. 232.

Declarations of Constitutional Rights.—Great interest attaches to the decision of the High Court in *Blythe and Others* v. *Attorney-General*[7] that Irish law recognizes the validity of procedure by action against the Attorney-General to obtain a declaration of a constitutional right. The question involved was the legality of the subordinate organization, the League of Youth, formed by the political party, Fine Gael, which is the official opposition in the State. The claim made was that the plaintiffs had a right, guaranteed by Art. 9 of the Constitution, to form such an association, that its objects were lawful, its organization also lawful, and the association working under it was lawful. In reply it was contended that the action was frivolous and should be struck out because it disclosed no cause of action. The action was evoked by the steps taken by the Government under ss. 19 and 27 of Art. 2A of the Constitution, as enacted by the Constitution (Amendment No. 17) Act, 1931, to declare illegal the Young Ireland Association formed under the auspices of Fine

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[1] [1909] 2 K.B. 61.

[2] [1912] 2 K.B. 299.

[3] [1912] A.C. 590.

[4] Swab. 96, *per* Dr. Lushington.

[5] 4 K. & J. 367. See also *Ex parte Blain*, 12 Ch.D. 522, at pp. 526, 531.

[6] See *R.* (*Alexander*) v. *Circuit Judge for Cork*, [1925] 2 I.R. 165. It was therefore unnecessary to refer to the Statute of Westminster, 1931, s. 3; *Croft* v. *Dunphy*, [1933] A.C. 156.

[7] [1934] I.R. 266.

Gael, and to obtain from the Constitution (Special Powers) Tribunal an order closing certain premises used for the purposes of that association. The court held that there was sufficient doubt as to the issues to be discussed to render such an action a valid mode of procedure. It followed the principle of *Dyson* v. *Attorney-General*,[1] and rejected the precedent of *Roesin* v. *Attorney-General*,[2] a case admittedly too slightly recorded to be worth citation.

The Liberty of the Subject.—The readiness of the Irish courts to observe the tradition of jealous protection of the liberty of the subject is illustrated very clearly in the proceedings in *In re O'Duffy*.[3] The case is interesting also because it shows the relation of the Art. 2A, which was added to the Constitution by the Constitution (Amendment No. 17) Act, 1931, to Art. 6. That measure,[4] passed amid much protest from the opposition party by Mr. Cosgrave's government and suspended in operation when Mr. de Valera attained power, was brought once more into force by decision of the Executive Council in August 1933 in order to deal with the activities of the newly consolidated opposition, then under General O'Duffy. As part of the measures taken under it, efforts were made to suppress the wearing of blue shirts by supporters of the opposition, and in connexion with this programme General O'Duffy found himself in conflict with the police and was arrested. The validity of his arrest was successfully challenged on *habeas corpus*. The ground of the decision is important. It was not held by the court that the Constitutional Amendment could in any way be challenged,[5] but it was laid down that, while full effect must be given to it as adding widely to the cases of legal imprisonment which alone is permitted by Art. 6 of the Constitution, it was necessary, since the liberty of the subject was concerned, that all the steps taken under the enactment of 1931 must be in strict conformity with the Act. The Act permits in certain cases arrest without warrant and detention in custody, but it was ruled that there had been irregularity of procedure. The Act permits arrest when a police officer suspects that a person has committed, or is about to commit, one of certain specified offences, and the police officer who arrested asserted that the arrest was due to his suspicion that the accused was a member of an unlawful association. The court, however, held that in fact the arrest was based on the fact that the General was trying to proceed to Westport, or was attempting to make a speech while wearing a blue shirt, and that accordingly it was not covered by the Act. It rejected also the contention for the State that the prisoner, even if illegally arrested, none the less was legitimately detained. Not only was the arrest which brought about the detention invalid, but the officer who arrested had omitted to follow the exact procedure of the Act as regards reporting the arrest to another officer not under the rank of inspector, who alone was empowered by the Act to make the detention order. The omission was due to the fact that, the arresting officer being of the rank of superintendent, it naturally seemed to him needless to observe a rule which was presumably based on arrest by an inferior member of the force. An irregularity of procedure was also reported to the court by counsel for the accused. The latter was in police custody when the notice of application for a writ of *habeas corpus* was given, but was transferred thereafter to the custody of the Governor of Arbour Hill Detention Barracks with a view to his being tried by the military tribunal provided for by the amendment to the Constitution. The court met the situation by ordering service on the Governor, and, after the decision that the detention was illegal, accelerated the release of the accused by ordering it to take place forthwith, instead of merely issuing the writ. It is satisfactory to record that the decision of the court received immediate effect at the hands of the Government, which also released all other persons of the legality of whose detention it was doubtful.

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[1] [1912] 1 Ch. 158.
[2] 34 T.L.R. 417.
[3] [1934] I.R. 550.
[4] See *Journ. Comp. Leg.*, vol. xiv, pt. i, pp. 111, 112.
[5] On December 19, 1934, the Supreme Court (Kennedy C.J. dissenting) affirmed the validity of the Amendment.

The English Language in Irish Litigation.—The curious position of Irish in the Free State is emphasized in the case of *O'Foghludha* v. *McClean*.[1] It was there sought to show that a provision of the Rules of Court [2] requiring that summonses in Irish, if not accompanied by a translation, should be officially rendered into English and an English version served with the Irish original, was invalid and unconstitutional. Most satisfactorily the issue was disposed of by the Supreme Court in a broad spirit of common sense and fair play. It was recognized that, while Irish was the national language, under Art. 4 of the Constitution English was entitled to equal recognition as an official language, and that it was not necessary that there should be absolute reciprocity of treatment. Under existing conditions, it is clear, many persons, even the most loyal adherents of the State, are unable to understand legal documents in Irish, and natural justice forbids the view that effective service of legal process is possible when the language used is unknown to the recipient of the summons. The case also illustrates another point. It was pointed out that the Rules of Court must be taken as a whole, and that a plaintiff who took advantage of the procedure by summary originating summons therein provided must not expect to be allowed to dispense with the service of an English version demanded by the Rules. Interest attaches also to the observations of Kennedy C.J. on the desirability of the production by a committee of lawyers aided by scholars of an Irish legal vocabulary.

Irish Pension Claims.—The extent to which the Irish law adapts to the State the rights of the Crown is neatly illustrated by several recent decisions. In *Conroy* v. *Minister for Defence* [3] it was claimed that the Minister was liable to an action to compel payment of a pension under the Military Service Pensions Act, 1924; but the defence successfully

[1] [1934] I.R. 469.

[2] Order XXIX, r. 3.

[3] [1934] I.R. 342.

stressed the general principle that Acts granting pensions to civil or military servants of the Crown could not be interpreted to make the grant mandatory in the absence of express provisions to that effect. In one set of cases action lies, but only in virtue of express treaty provisions, namely those of the agreement of 1929 dealing with compensation to officers retired in consequence of the establishment of the Free State. In their case it is decided in *De Lacy Smith* v. *Attorney-General* [1] that the special tribunal established under the Civil Service (Transferred Officers) Compensation Act, 1929, has exclusive jurisdiction to dispose of these claims. The court expressly negatived the suggestion that it could make a declaration of right in the matter, even if it had not the power to determine an award, and adduced the authority of the House of Lords in *Barraclough* v. *Brown* [2] as to the effect of conferring on any tribunal exclusive jurisdiction.

English Law in Ireland.—The noteworthy case of *Moore* v. *Attorney-General* [3] has a special interest because of the careful discussion therein of the process, afterwards repeated in the colonies, by which English law was imposed on a conquered territory. It is interesting in any case to observe that the judges by whom the case was decided were not concerned to deny the fact of an English conquest; there is no echo of the contentions of those who insisted that Ireland never was a conquered dependency as an argument for the thesis that English Acts had no power to bind Ireland.[4] The issue involved was the legality of the existence of a several fishery in the tidal waters of the Erne in Donegal, and admittedly since Magna Carta (c. 16) such a fishery cannot be created by royal grant save in so far as such a fishery had already been in existence by 1189. The actual fishery in dispute was in territory which was not conquered before 1541 and perhaps much later, and evidence of Brehon law established to the satisfaction of the court that that law did not permit the creation of several rights of fishery in a navigable stream. English law definitely became attached to the area in 1612 by statute of James I, who extended the system to his territories now made effectively subject to the Crown. Fitzgibbon J., however, raised a most interesting question [5]; could the Crown by virtue of conquest have exercised before 1612 as a matter of prerogative the right to create a several fishery? It is clear from his remarks that he held as probable the view that such action could have been taken on the principles enunciated in *Campbell* v. *Hall*,[6] and that the rules applicable to settled colonies as stated in *Attorney-General for British Columbia* v. *Attorney-General for Canada* [7] had no application to Donegal at the beginning of the sixteenth century when it was freshly conquered. But he did not decide this issue, for the plaintiffs had admitted[1] that Magna Carta was in force before the reign of Elizabeth in Tirconnaill, and the chief grant whence title could be traced was under James I. His dissenting judgment upholding the validity of the right exercised for over three centuries unquestioned, rested on the interpretation of statutes of Charles I,[1] which he held were sufficient to mend the defect in title of the grantees. It must, however, be noted that it is possible to suggest that, though English law was not introduced into Tirconnaill before 1612, the power of the Crown as a conqueror was limited, and that in the words of Lord Mansfield he could make no laws " which are contrary to fundamental principles, he cannot exempt an inhabitant from the laws of trade or authority of Parliament, or give him privileges exclusive of his other subjects." Would not the last clause—not cited by Fitzgibbon J.—invalidate an attempt to create by prerogative a several fishery in navigable waters ? On the other hand, Kennedy C.J. and Murnaghan J. held that the statutes were insufficient to override the dominant force of Magna Carta, and suggested that the grants were made through failure to realize that Magna Carta prohibited the creation of several fishery rights. It is clear, in point of fact, that the view was prevalent in Ireland in Sir John Davies' time[2] that such grants could be made, even in England. Coke appears to suggest that the prohibition of Magna Carta was not in operation, and it was left for the House of Lords in *Malcolmson* v. *O'Dea*[3] in 1863 to lay down the doctrine which, applied to the Erne fisheries, has had so remarkable a result. The most obvious criticism of the decision of the majority of the Supreme Court is that, where the right had so long been exercised and recognized even by statute as existent, it would have accorded better with the general trend of jurisprudence to give to the doubtful statutes the interpretation which secured the continued validity of the grants. The view taken by the majority can best be regarded as asserting that in the case of a clear derogation from a public right, it is proper to put the claimant to the strictest proof of the legitimacy of his claim. The interpretation of the law should thus incline to extracting from a given legal situation the maximum of public advantage.[4]

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[1] [1934] I.R. 139. That the Attorney-General was rightly made defendant was upheld by the court citing *Wigg and Cochrane's Case*, [1927] I.R. 285, at p. 290, *per* Lord Cave; *Birmingham and Others* v. *Attorney-General*, [1932] I.R. 510.

[2] [1897] A.C. 615.

[3] [1934] I.R. 44.

[4] *Cf.* Keith, *Constitutional Law of the First British Empire*, pp. 381, 382.

[5] [1934] I.R., at pp. 87–95.

[6] 20 St. Tr. 239.

[7] [1914] A.C. 153.

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[1] 10 Car. I, sess. 3, c. 3; 15 Car. I, c. 6. Kennedy C.J. and Murnaghan J. ascribed the introduction of English law to 33 Hen. 8, c. 1, [1934] I.R. at p. 63. This view, of course, negatives the possibility of a legal origin for the grant of 1603.

[2] Dav. Rep. 149 (*Case of the Royal Banne*).

[3] 10 H.L.C. 593.

[4] This decision is the basis of an appeal to the Privy Council, which necessarily has raised the issue of the validity of the Free State legislation abolishing the appeal; on this no decision was given when these notes were written; the Privy Council held that the question would more suitably be dealt with in a defended case which might be presented involving the validity of the Canadian Act of 1933 abolishing the appeal in criminal cases; *The Times*, December 5, 1934.

NOTES.

Law and History.[1]—Maitland's achievement has taught English lawyers that history can humanize law and that law can correct history. That is a lesson which can never be too often repeated and enforced; and, for many reasons, all who are interested in the two allied subjects of legal history and comparative law will be encouraged by the manner in which, in this address, Lord Macmillan has repeated and enforced it. There is no living lawyer who is better fitted than Lord Macmillan to do for Scottish lawyers what Maitland has done for English lawyers; for his genius both as a lawyer and a man of letters is akin to that of Maitland. Lord Macmillan points out that "the laws of a nation faithfully reflect its history, its genius, its aspirations"; that a lawyer who has no history will be a mere legal mechanic; and that "there is no branch of knowledge which does not at one time or another prove of service to the lawyer in his practice." For all those propositions Lord Macmillan cites good English and Scottish authority. In addition, I should like to cite two English authorities of the seventeenth century which come singularly close both in thought and phrasing to the thesis of this address. At the beginning of that century Mr. Justice Dodderidge said, in his *English Lawyer*, that "the study of the Lawes must of necessity stretch out her hand and crave to be holpen and assisted by almost all other sciences"; and, at the end of that century, Roger North, in his *Discourse on the Study of the Laws*, said, "it is a vast advantage to be not only a common lawyer, but a general scholar, as in latter times Selden was; for what you call a mere lawyer, seldom reaches better preferment than to be a puisne judge, if at all to be ever invited from his chamber."

Lord Macmillan is the moving force behind the new Stair Society which is setting out to do for this history of Scottish law what the Selden Society has done and is doing for the history of English law. It is obvious that the work of the Stair Society will be almost as important for the historian of English law as for the historian of Scottish law. As Lord Macmillan has elsewhere pointed out, the history of Scottish law has made the intellectual outlook and the intellectual processes of Scottish lawyers different from those of English lawyers; and it has given to Scottish lawyers an acquaintance with bodies of continental law which English lawyers have never had. At the same time, ever since the Act of Union, the two systems, though distinct, have influenced one another. Therefore the study of the history of the Scottish law will stimulate the making of those comparisons which are needed to elucidate many of the problems in the history of the English and other legal systems, and to emphasize both the peculiarities in the development of the English and other legal systems, and the results of those peculiarities. If the Stair Society carries on its work in the spirit indicated in this lecture, it will earn the thanks of the historians both of Scottish and English law; for, by illuminating many dark places in the history of the law of both countries, it will help the lawyers of both countries to a better understanding of their laws, to their intelligent administration, and to the framing of some projects for their improvement.

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[1] An address delivered to the Scottish Law Agents' Society, by the Right Hon. Lord Macmillan. (Edinburgh: William Hodge & Co.) Price 1s.

W. S. HOLDSWORTH.

The Law Quarterly Review.—The Jubilee number of the *Law Quarterly Review* is at once a valuable record of fifty years of legal changes and a witness to the vitality and energy of our learned contemporary. The writer's own life " in the law " has not been many years shorter than the life of the *Law Quarterly*, and throughout the greater part of the period he has not failed to enjoy and to profit abundantly by a paper of which the standard has been always maintained. And this experience has most certainly repeated itself wherever the Common law is applied or studied.

The articles in the Jubilee number cover a wide range and present legal movements of the past fifty years from varying points of view. Many readers will probably be struck by the moderate character of the bulk of the reported changes; on the whole nothing much has happened since 1885. The pace is somewhat accelerated when we come to deal with Local Government law and Industrial law, and the Property Acts suggest a more radical revolution than they perhaps accomplish. But the great period of Law Reform had closed before the first number of the *Law Quarterly* appeared. The practitioner of 1885 would not feel so out of date to-day as the lawyer of 1835 might have felt if called upon to advise in 1885. The changes in the past fifty years, radical as they have been in the conduct of life, have been rather administrative than legal. Particularly do we commend Dr. Carr's instructive and amusing article on Administrative Law, Dr. Jennings on Local Government Law, and Master Ball's short but pithy review of Practice and Procedure. But this is an indication of personal interest and not a comparative appreciation; all the writers are well known to us all, and highly honoured.

To Professor Goodhart and his coadjutors we tender grateful thanks and congratulations and offer good wishes for a second and prosperous quinquageniad.

F. M. G.

The Constitution of the U.S. of Brazil, of July 10, 1934.—When the Provisional Government of Brazil had installed itself in November 1930, a decree was issued which stated in its Art. 12 that the new Constitution which would be worked out by a Constitutive Assembly should preserve the form of a Republic with representative government, and that neither the prerogatives of the municipalities nor those of Brazilian citizens, nor the liberties guaranteed under the Constitution of February 24, 1891, would be jeopardized. The *Constituição da Republica dos Estados Unidos do Brasil* signed by the members of the *Assembléa Nacional Constituinte* on July 16, 1934, keeps the promise made by the Provisional Government. The new Constitution goes in many respects far beyond the enactment of 1891, which was a compound of U.S.A., Argentine (1853–60) and partly Swiss (Federal) constitutional law, but it bewares of extremes, whether in the way of the *Führerprinzip*, corporative experiments, nationalism, or State socialism, and though affected by all of them, the nationalist tendency is strongest. Only a complete study of the minutes accumulated in the course of three years would show in what way the compromises, of which the new Constitution is the outcome, have been reached, but even a judgment based on the careful consideration of the legal text shows that the rôles of the President of the Republic, the Chamber of Deputies and the Senate have been well balanced, that the control of constitutionality exercised by the Supreme Court ought to be an effective check, and that the new feature of Election Courts (*Justiça Eleitoral*), for Federal, State and municipal elections ought to prevent the abuses of which complaint was made before the revolution. While in the Constitution of 1891 the Senate was simply a second chamber, elected in the States but in the same way as the Chamber of Deputies, the new law provides that the Chamber of Deputies has the chief functions of the Legislative, while the Senate is charged with the " co-ordination of the powers " (*coordenação dos poderes*), that it has some prerogatives in the nomination of high officers of the State and of justices, that one-half of it sits as Permanent Section with important temporary powers during the recess of the Chamber, with which it co-operates ordinarily in the working out of organic laws. The Court of Accounts (*Tribunal de Contas*) has been promoted to importance in the Constitution, and ought to be able to check uncontrolled expenditure, although the Legislature has the last word (ss. 99–102). Each Ministry has official technical counsel of whom at least one-half must not belong to the ranks of bureaucracy. They may be consulted by Chamber and Senate, and against the unanimous advice of them, if consulted as a " General Council," no Ministry should act (s. 103.) In the " Declaration of Rights " woman suffrage has been included, but women are only bound to be listed as electors and to vote if they are vested with a remunerated government post. Women are eligible to all offices and posts (ss. 108, 109). A quite modern feature is that nobody is to be deprived of any rights (*direitos*) on account of his philosophical, political or religious convictions, except that a person who declines on account of them to fulfil the ordinary obligations of a Brazilian citizen (such as military service, from which of course women are exempt) will also be deprived of his political privileges, such as the right to vote or eligibility to any office or post.

The corporative idea is not worked out in detail, but it is recognized by the fact that while four-fifths of the members of the Chamber of Deputies are elected by direct, equal and universal vote under the proportionate system, one-fifth are elected by the professional associations of which there are four divisions ; produce and cattle farming (*lavoura e pecuaria*) ; industry ; commerce and transportation ; professions and public officials (s. 23). Nationalist, collectivist and socialist theories have played a considerable rôle in working out Title IV of the Constitution. The economic and social order (*Da Ordem Economica e Social*) would require a paper of its own. It is impossible to bring its tendencies under a common denominator. Perhaps s. 115 Const. shows its trend and its difficulties : " The social system (*ordem*) must be organized according to the principles of justice and the necessities of the national life, so as to afford to all (*possibilite a todos*) a dignified existence. Within these limits, economic freedom is guaranteed."

Far-reaching plans and good will are undoubtedly shown in Title V, on " The Family, Education and Culture " (*Da Familia, da Educação e da Cultura*), but they will be plans for a long period of time.

Finally, we have to mention as a strong trend of the new Constitution its nationalist character. No naturalized alien can be appointed to any of the higher offices of the Republic, whether as a member of the Legislative, the Senate, the Supreme Court, as a Minister of State, or a member (also called Minister) of the Court of Accounts. It is the same for the States. More important from a non-Brazilian point of view is the fact that the restrictive features of the actual immigration policy have been incorporated into the Constitution, viz. that the immigration quota from each country shall not exceed 2 per cent. per annum of the number of persons immigrated from each country in the course of the last fifty years (s. 121, § 6). This may work out to the detriment of nations the nationals of which have immigrated in ships of other nations, as the statistics in such cases may not be quite reliable. Further, the Constitution provides that banks and insurance companies (s. 117) shall be progressively "nationalized"; that concessions for mines, water works, etc., shall be exclusively awarded to Brazilians (s. 119, §1) and Brazilian companies ; that to Brazilians adverse possession of lands which they cultivate may be facilitated (s. 125) ; that except as to persons already exercising liberal professions at the date of publication of the Constitution, or in case of international treaty reciprocity, only Brazilians and such naturalized foreigners as have done military service in Brazil may exercise them, and only to natural-born Brazilians will the validation of foreign degrees or diplomas be granted (s. 133). The law will determine the percentage of Brazilian employees to be maintained in establishments run under concession and in other branches of business and industry (s. 135). These are the most striking cases. Thus we may note that of the several tendencies of the new Brazilian Constitution the nationalist is probably the strongest, while the balancing of the others is a question of ways and means.

MARCUS WYLER.

Palestine Law Reports.—The Chief Justice of Palestine has in the press a compilation of reports of important cases decided since the establishment of the Supreme Court. This is welcome news. Meanwhile the *Palestine Post* continues to fill an important function in this respect and has issued an annual digest of its reports for 1933. In 1934 perhaps the most interesting case has been *Barhum* v. *C.E.O. Jerusalem and Ismir,* reported on February 19, 1934. In this case a decree for the restitution of conjugal rights had been passed by the Latin Ecclesiastical Court in Jerusalem and transferred to the Chief Execution Officer for execution. That officer had thereupon passed an order directing the wife to be returned to her husband " through the instrumentality of the police " ; an order which was admittedly in accordance with existing practice. The High Court, however, on the authority of a precedent drawn from the Execution Office at Constantinople, held that such an order cannot be executed by force " whether by the police or otherwise," and it approved a dictum of the Chief Execution Officer, Constantinople, that " execution proceedings in *Sharia* judgments the effect of which is to order obedience thereto come to an end by informing the person adjudged of the effect of the judgment." In these words, a Muhammadan lawyer was able to explain Muhammadan law in conformity with the most enlightened views of the West.

It should be noted in this case also that, although the decree was one of the Latin Ecclesiastical Court, the execution proceedings were according to Muhammadan or at least Ottoman law ; a striking illustration of the fact sometimes overlooked that the Muhammadan system is still the basic common law of Palestine.

S. V. FG.

Bankruptcy of Non-Traders.—Latin countries in general have not extended the system of bankruptcy to non-traders. This fact always seems to surprise Anglo-American lawyers not conversant with continental practice ; yet none can deny that there are wide differences between the character of the usual assets available and the probable liabilities incurred in the case of the insolvent trader and in that of the insolvent farmer, professional man or wage-earner. These differences may well justify differences in treatment.

Mr. Holm-Nielsen, in a recent number of the *Bulletin de Législation Comparée,* discusses in an instructive and illuminating manner the extent to which American, English, Danish and German law in particular, have made provision to meet the circumstances of the insolvent non-trader. He notes, to begin with, that special procedure for farmers has been recently instituted in Denmark (1927), Germany (1932) and the U.S.A. (1933), as well as in other countries of Europe. These provisions are obviously the result of the present depression. As regards professional men and wage-earners, genuine attempts to meet the special circumstances are largely to seek. Mr. Holm-Nielsen notes recent proposals on the subject in the U.S.A., but he mentions with particular approval the system of Administration Orders under s. 122 of our own Bankruptcy Act, 1883, not repealed in 1914. For small bankruptcies of this kind he advocates the creation of a central bureau, or a number of local bureaux, by which the allotted dividends would be forthwith paid to the creditors, and which would itself undertake the subsequent collection from the insolvent debtor of the prescribed periodical payments. Such a scheme would not only avoid the tiresome and repeated payments of minute sums to the separate creditors, but would save the costs of separate administrations, which may well be out of all proportion to the amounts involved.

The subject is one which merits attention.

A Survey of the Law of the Empire.—So soon as active steps are taken to carry out the recommendation of Lord Atkin's committee to establish an Institute of Legal Research, the work of the London School of Economics, as well as that of the Society of Comparative Legislation, will require appreciation. Since the Schuster Library was entrusted by the Society to the care of the School of Economics it has been the established policy of the Society to add any publications at its disposal not already in the library. Moreover, the publications of the two bodies are complementary to each other. *The Survey of English Law*, which is issued from the School of Economics, carries out in respect to English law the aim of the Society in respect to the laws of the Empire. *The Survey*, which is the work of a body of learned collaborators, contains a summary of the legislation, a commentary upon decided cases and a review of literature in an ordered plan which provides a thoroughly workmanlike and reliable work of reference. The sixth volume [1] covers the year 1933 and is indispensable to lawyers and legislators throughout the Empire, besides being of considerable value to many corporations and societies concerned with legal matters. Moreover, it is published regularly within a reasonable lapse of time after the conclusion of the year surveyed in it. Owing to the much wider field covered by the Society's review of legislation and the larger number of collaborators contributing to it, the date of publication has always presented some difficulty. Time and distance in these days, however, are diminishing obstacles, and it may well be that the time has come to take a definite step forward in providing a volume of Imperial scope analogous to *The Survey of English Law*.

International Legislation.—The study of comparative legislation which has been fostered by our own Society within the British Empire and beyond, and by similar societies in other countries, has been one of those inadequately appreciated influences in developing unity of thought in the realm of law among many nations. Mr. F. N. Keen, in a stimulating little book containing proposals for " A Better League of Nations," [2] urges that its importance is " so great that its promotion ought not any longer to be left to the efforts of societies and institutes in certain countries, but should be accepted as one of the co-operative tasks of all the Governments of the world." The main proposal of his book is wider in its scope and aims at giving legislative power to the League of Nations so that there may be created a corpus of international legislation. Among the subjects which he includes in an amended Covenant of the League as suitable for legislation by the Assembly are common systems with respect to currency and central banking, weights and measures, traffic by land, water, air and submarine, postal, telegraphic, telephonic and wireless arrangements, an international police force, public holidays, daylight saving, and a wide variety of other subjects common to all nations. Although Mr. Keen's proposals may seem to be somewhat chimerical, a detailed examination of many of these subjects would show that there is a considerable uniformity even among nations widely differing in forms of government and conditions of life. It may be that practical steps might be taken by the constitution under the auspices of the League in its present form of a body of commissioners on the uniformity of laws similar to those which are doing excellent work in Canada and the United States. Undoubtedly, present circumstances require an increased attention to the value of the study of comparative legislation on account of its practical importance in the solution of the problems which are common to many of the nations. It may even make its contribution in a practical way to that peace and unity which ideally is so desirable but seems to be so difficult of attainment by more grandiose plans and conferences.

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[1] (London: Sweet & Maxwell, Ltd.) 10*s*. 6*d*.

[2] (London: Allen & Unwin). Pp. 160. 5*s*.

The Penal Code of the Russian Socialist Federal Soviet Republic.[1]—An English translation of the Russian Penal Code of 1922 was published in 1925. The Code of 1926 contains—especially in its General Section—so many important changes that it is impossible here to mention even the most striking of them. The new translation thus fills up a real gap, and all the more since it includes the very numerous amendments up to June 1934 (for example, the Sodomy Act of March 7, 1934). Since the German translation dates from 1931, this new publication offers to jurists unacquainted with the Russian language their sole chance of studying the Russian Criminal Law in its present form. The Soviet Criminal Legislation, it is true, has even now by no means assumed a finished form. As late as 1930 two new draft codes were published, one of them drafted by the Section for Criminal Law of the Communist Academy under the chairmanship of Krylenko, the then Attorney-General. In these circumstances, it is difficult to say how long the code of 1926 may remain in force.

HERMANN MANNHEIM.

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[1] Text of 1926 (with Amendments up to December 1, 1932), with three Appendices. Foreign Office, July 1934. (London: H.M. Stationery Office, 1934.) Pp. 82. 1*s*. 3*d*. net.

Annales de l'Institut de Droit comparé de l'Université de Paris.—In the preface Professor Lévy-Ullmann tells us that the *Annales*,[1] of which this is the first instalment, are designed as a collection of essays representative of the work of the Institute, to be published from time to time as occasion arises. This volume contains essays touching a wide variety of subjects both of public and private law.

Regard for the space at our disposal makes possible a mere reference to those relating to Public Law, which include a comparative study by M. Mirkine Guetzévich on the working of parliamentary institutions, an essay on the Referendum, and discussions of parliamentary development in Sweden and of the constitutional law of the Baltic States and of Czecho-Slovakia.

Professor Cottino of Turin contributes a short exposition of the manner in which the Concordat of 1929 between the Italian State and the Papacy has been worked out in the law of marriage. The Italian solution follows lines familiar to us. The civil validity of a marriage celebrated in accordance with the Roman Canon law is fully recognized if accompanied by certain State formalities, and like recognition is also afforded to marriages celebrated before the ministers of other religious bodies. The problem of matrimonial jurisdiction presented greater difficulties, and the limited recognition of the competence of Papal ecclesiastical courts, though stated to be inevitable in the circumstances, does not commend itself to one familiar with the working of ecclesiastical courts not subjected to State control.

The English lawyer will probably be primarily attracted by the essays which treat English law from a comparative point of view. M. Mitchell, in his *Rapports du droit civil et du droit commercial en droit anglais*, does not seek to do more than give a summary statement of the English law of contract and of bankruptcy. Mlle. Depitre, however, in her *Relâchement et dissolution du lien matrimonial en Angleterre*, makes several interesting comparisons between French and English law, and insists, not without much truth, that the tendency of the English law is to treat divorce and separation not as means of escape from a relation which has become intolerable, but rather as sanctions pronounced against a guilty party. The Matrimonial Causes Bill sponsored by the late Lord Buckmaster would, had it become law, have given expression to the other point of view.

This is not the place to suggest criticisms of detail, but we may express regret at the writer's apparent approval of a dictum in Glasson to the effect that the absence of judicial divorce in England prior to 1857 was due to "*la haute idée que les Anglais se sont toujours faite du mariage.*" It is true that in spite of the *Reformatio Legum* and some judicial hesitation in the sixteenth century, the law of the Reformed Church ultimately rallied to extreme Roman principles, but the question why this came to pass is not to be concluded by sentimental generalizations.

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[1] Vol. i. (Paris: Librairie du Recueil Sirey, 1934.)

Mlle. Lévy-Caen in her *Usage abusif du nom en droit français et en droit anglais*, deals mainly with the law of libel. Some of her comparisons of French law and English law are suggestive. Her conclusion that in England punishment rather than reparation is the desired result of civil actions for libel is just, and her further remark that the punishment is proportioned not so much to the fault committed as to the risk created probably represents the usual attitude of the English jury. It may, however, be doubted whether all would be prepared to accept without reservation her conclusion that "*la sévérité des tribunaux anglais semble justifiée en matière de diffamation et au point de vue pénal, nous gagnerions à y puiser un respect plus strict de l'individualité, un souci plus grand de verité et de moralité.*"

But the article most suggestive, to the reviewer at least, is that by M. Marc Ancel concerning the project submitted by M. Renoult to the Senate in 1932, for the modification of the French law as to the capacity of the married woman and the recasting of the law as to the proprietary relations of husband and wife. The order in which law develops in different countries seems sometimes to be due rather to the spirit of Puck than to any more reasonable impulse. Earnest English feminists are still clamouring for the almost empty bauble of separate nationality for married women, which the French law of 1927 has already accorded to a greater degree than has our Act of 1933. Yet even elderly lawyers in England have been accustomed from their youth to think of married women as on an equality with their husbands in matters of property and contract. It is difficult to carry ourselves back to a state of thought in which it can be solemnly discussed whether a married woman should be legally allowed to do as she likes or ought not rather to leave the conduct of her life and affairs in the hands of that "wiser" being, her husband. The language of Arts. 213 ff. of the French Civil Code which the project proposes to recast seems to us to savour of hoary antiquity, and that interesting mediæval survival, *le régime en communauté*, to be the proper subject not of serious reconsideration but of antiquarian monographs. However, it is not for an English lawyer to cast stones; his own dwelling-house is too little proof against similar assaults. And in this, as in many matters, law does not reflect contemporary life. M. Ancel himself remarks that in social life the position of a French married woman is in no way inferior to that which she would occupy in a country in which the full civil capacity of married women has long been recognized.

F. M. G.

Anales de la Facultad di Ciencias Juridicas y Sociales de la Universidad de la Plata.—This volume[1] of the well-known series contains as many as twenty-one articles treating of very varied subjects, historical, constitutional, juridical, penal, philosophical and expositive. It is difficult and not very useful to do more than call attention to the genera interest and excellence of the articles which on the whole are equal to the high standard of the series. It may be mentioned that of the twenty-one contributions to this number the following should most interest the members of this Society: (1) An essay on constitutional guarantees by Dr. J. C. Rebora, which ably contends for the inviolability of what are known as "The Rights of Man," which of late have been violated in most of the dictatorial states; (2) the Spanish Constitution, by Dr. C. D. Cisneros, which includes the international law as there incorporated and the Argentine Treaties; (3) joint and several liability for criminal offences and quasi-offences, by Dr. Enrique V. Galli; (4) the new agrarian legislation in Spain, by Dr. L. Mendez Calzada, where the tenancy is shown to be most like the Emphyteusis with the State as universal landlord; and (5) an attack by Dr. E. R. Elguera on the concept of *patrimonium* as stated in Aubry and Rau, vol. vi, s. 573.

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[1] Tomo VI, 1933, pp. 869.

WYNDHAM A. BEWES.

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.—The numbers for January 1934 and May 1934[1] of this excellent journal contain 480 pages of valuable and instructive matter in German, French and English.

We may draw attention particularly to the article in English giving the constitution of Manchukuo, and to Mr. Norman Bentwich's account of the "Development of the 'B' and 'C' Mandates during the years 1928–1932." Among the German articles one of special interest is that by Dr. Joachim von Elbe comparing the Treaty of Versailles very unfavourably with the Treaty of Vienna.

The bibliographies are a great feature of this journal.

F. P. W.

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[1] *Band* IV, Nos. 1 and 2. (Berlin: Walter de Gruyter & Co.) Pp. 480. R.M. 25.

NOTICES OF BOOKS.

DECLARATORY JUDGMENTS.[1]

"The main characteristic of the declaratory judgment, which distinguishes it from other judgments, is the fact that it conclusively declares the pre-existing rights of the litigants without the appendage of any coercive decree." Legal proceedings directed to obtaining a declaratory judgment thus defined had long been permitted in Scotland. "Between 1820 and 1850 there was a good deal of agitation, led in the main by Lord Brougham and his friends, for the adoption in English practice of the Scotch action of declarator." The first legislative recognition in England of the desirability of reform in this direction is to be found in the so-called "Special Case Act" of 1850,[2] "which permitted persons interested in the construction of written instruments to agree in the statement of a special case to the Court of Equity, determination of which by the court had the same effect as upon a suit instituted by bill." In 1852 the Chancery Procedure Act provided that "no suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief." The effect of these provisions was considerably narrowed by judicial rulings to the effect that proceedings thereunder must be confined to cases in which the plaintiff had a present right to consequential relief for which he had merely chosen not to petition. "It was not realized then that the need for certainty and security was a judicially protectable interest and that it might often be quite sufficient justification for invoking the judicial process." A further step was taken by Order XXV, rule 5, of the Supreme Court Rules of 1883, which provided that "No action or proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not." Nevertheless, owing, in the opinion of Professor Borchard, to the prevalence of narrow views concerning the term "cause of action" and its association with a supposed "wrong" by the defendant, it was not till the case of *Dyson* v. *Attorney-General*,[3] or perhaps, till the more emphatic decision in *Guaranty Trust Co. of*

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[1] By Edwin Borchard, Hotchkiss Professor of Law in Yale University. (Cleveland: Banks-Baldwin Law Publishing Co., 1934.) Pp. xxii + 669.

[2] 13 & 14 Vict. c. 35.

[3] [1911] 1 K.B. 410; [1912] 1 Ch. 158.

New York v. *Hannay & Co.*,[1] that the door to purely declaratory decrees was, in this country, thrown as wide open as is desirable.

The primary object of Professor Borchard's book is to bring all the available resources of reason and illustration to the support of the cause of the declaratory judgment in the various jurisdictions of the United States. "It ought to be evident," says the author, "from the cases examined in this volume, that individual and social needs are in many cases adequately and more effectively subserved by a mere declaration of rights than they could be by any more vigorous and belligerent judgments." "No one can read the English Chancery Reports without appreciating that all parties to the judicial proceedings for a declaration of rights appear to remain gentlemen, and that it is possible to have differences as to legal rights without becoming enemies."

The English precedent has been followed in India and by many other legislatures in the British Empire, and considerable headway has already been made in America. On June 14, 1934, President Roosevelt signed a federal Declaratory Judgment Act, in the preparation of which Professor Borchard took a leading part. A Uniform Declaratory Judgments Act has been prepared by the Commissioners on Uniform State Laws, in the drafting of which also Professor Borchard took a prominent share, and either this model statute or its analogue has been adopted in thirty-four states and territories.

But Professor Borchard's treatise is far more than a propagandist tract; it is an impressive monument of painstaking scholarship, in which, through over 600 pages, the topic of the declaratory judgment is exhaustively explored and illustrated, both historically and comparatively, and not only in the various domains of Anglo-American law, but in those of practically all other existing systems of jurisprudence. Its possession will, or should, be in future a test of the pretension of any self-respecting general law library.

M. S. A.

THE CONSTITUTIONAL DEVELOPMENT OF AUSTRALIA.

Dr. A. C. V. Melbourne's work on Australian constitutional history is already favourably known from the chapters which he contributed to the Cambridge History of the British Empire, and a warm welcome is due to his detailed investigation of the constitutional history of New South Wales from 1788 to 1856.[2] Australian constitutional beginnings reveal more or less benevolent despotism in the most remarkable form, and the process of emerging from that state was delayed by considerations arising out of the transportation system. Moreover the struggle for responsible government was fought out in Canada, and New South Wales stepped into an inheritance conquered by others. Nevertheless there is much that is instructive in a detailed study of the development, and it is the special merit of Dr. Melbourne's work that he supplies many details which are welcome and which help to explain matters left obscure even in so meritorious a work as Sweetman's *Australian Constitutional Development.* His narrative is also well proportioned, and he realizes that constitutional history is meaningless unless studied in close relation with the general course of Australian history. Examination reveals little lacking that could be asked for, and it seems unlikely that any future investigator will be able to add much to this account.

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[1] [1915] 2 K.B. 536 (C.A.).

[2] *Early Constitutional Development in Australia. New South Wales*, 1788–1856. By Dr. A. C. V. Melbourne. (London: Humphrey Milford, Oxford University Press.) Pp. viii + 456. 25*s*.

A few minor points may be noted. In a more definitely legal discussion of the validity of the legislative activities of the early Governors (pp. 27–36) it would be necessary to examine in detail the regulations or orders they issued, and to determine what parts of them could be justified as exercises of the executive power delegated by the Crown and what parts might be regarded as merely declarations of English law applicable to the colony, and *eo nomine* within the Governor's powers. There would remain a residue of regulations which were *ultra vires*, but, until the attempt to discriminate is made, the extent of the illegality must remain doubtful. There has perhaps been a tendency starting with Bentham (1802–3) to treat the issue as simpler than it was. To Chief Justice Forbes's attitude in respect of his control of legislation under the Act of 1823 lawyers would perhaps incline to be more sympathetic than was James Stephen of the Colonial Office or is Dr. Melbourne (p. 116). The abolition of the appeal to the Governor from the Supreme Court by the Act of 1828 (p. 161) was wise, but it was really an innovation rather than an approximation to the normal arrangements in other colonies, for in them the normal Court of Appeal still was the Governor in Council, a stage which Australia in this case avoided. The Act of 1791 for Canada did not provide for the grant of hereditary titles (p. 403) nor did it attach to them the right of summons to the Legislative Council ; it gave (s. 6) to the King the power to annex to a hereditary title the right of summons, which in fact was never exercised ; no legislator in 1791 would have dreamed of conferring on the Crown statutory authority to confer honours, which remains even now a matter of prerogative. It is curious also to find that responsible government is mentioned (pp. 424, 425) without recognition of the services rendered to it by Robert Baldwin or Sir Charles Bagot or appreciation of Earl Grey's part in its establishment ; the merits of Durham and Elgin should not obscure the priority of other statesmen.

A. BERRIEDALE KEITH.

PARLIAMENTARY REFORM.[1]

THE title of Dr. Jennings' little book is significant. At any time during the last century parliamentary reform has meant the extension of the franchise or the rearrangement of the electoral machine. Dr. Jennings is concerned with neither of these things. His interest is in the improvement of the procedure of the House of Commons; he alludes only in passing to the cognate subjects of the House of Lords and "devolution," in the latter of which, whether it be local or functional, he has not much faith. Even the burning question of delegated legislation attracts him little; for he regards the Donoughmore Report as having admitted its necessity, and the extent of it to be a matter of policy rather than procedure.

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[1] By W. Ivor Jennings, M.A., LL.D. (London : Victor Gollancz Ltd., for the New Fabian Research Bureau, 1934.) Pp. 175. 3*s*. 6*d*.

In view of the quasi-official origin of Dr. Jennings' book, the reader will not be surprised to find that the author's chief end is to promote the efficiency of the House of Commons by increasing its activities, legislative and administrative. Whilst clear that, in an effective democracy, the initiative and driving force in the matter of legislation, as well as the ultimate responsibility for administration, must rest with the Government of the day, Dr. Jennings thinks that much greater use might be made of the abilities of the private member in the directions of criticism and instructed advice. His main suggestion towards this end is a substantial increase in the number, accompanied by a corresponding decrease in the size, of the standing committees of the House. After some hesitation, he comes down on the side of an arrangement which would create in the House standing committees corresponding to each of the chief "legislating" departments of State (Home Office, Ministries of Health, Labour, Transport and Agriculture, Boards of Trade and Education, and the Scottish Office), in addition to a specially important Finance Committee and a Drafting Committee. The fact that each of these committees would be substantially smaller than a Standing Committee as at present constituted would, in Dr. Jennings' view, have the double advantage of producing a more business-like and less partisan atmosphere, despite the fact that the committee would be composed on party lines, and of enabling its members to get their committee work done without clashing with sessional hours. The difficulty of finding enough members of the Government to present the Government case at the numerous committee meetings simultaneously going on is to be met by the greater use of junior Ministers, and, on technical matters, of Civil Servants of high, though not necessarily the highest, rank.

It is obvious that Dr. Jennings intends his new type of committee to be of a much more active character than the present type. It will not be merely the patient servant carrying out the tasks imposed upon it by the House, but a somewhat formidable critic and stimulator of administrative action. It may check the opinion of the official expert by independent advice, though not of the "professional witness" type. In the case of the Drafting Committee, at any rate, it may even comprise persons who are not members of the House. To the objection which (we gather) is shared by some of Dr. Jennings' political friends, that his proposals obviously suggest a French rather than an English Parliamentary system, Dr. Jennings returns the brief and not altogether self-explanatory answer that "the French committees have enormous power because every French Government is a coalition" (p. 158). If, as a fact, the House of Commons of the future came to attach more weight to the reports of its Standing Committees than to statements of Government policy, that fact could hardly fail to lessen the stability of Governments.

But it would be unfair to Dr. Jennings to give the impression that his book deals only with his pet committee scheme, though that is, undoubtedly, his most sweeping proposal. He also traces the progress of an ordinary Public Bill through the House, and makes detailed suggestions for time-saving. Thus he would abolish the private members' ballot, and make greater use of the "Ten Minutes Rule" (with automatic reference of a successful motion to the appropriate Standing Committee), the substitution of resolutions for the formal presentation of a Bill for Second Reading, the abolition of "financial resolutions" entailed by many Bills, which, in effect, produce a repetition of speeches in the Committee stage of the Bill, the use of the closure, the "kangaroo" and even (with the express authority of the House) the guillotine in the Standing Committee stage, the limitation to one day of the debate on the Report and Third Reading of a Bill, and an increased use of "clauses" Acts.

The chapter on financial legislation suggests a reduction in the number of Consolidated Fund Bills by means of a Vote in Ways and Means sanctioning expenditure authorized by Votes in Supply up to the passing of the annual Finance Act, and the omission of the purely formal Appropriation Act. Dr. Jennings seems to think (p. 121) that the "Bowles" Act has permanently altered the position ; but we may remind him that that statute has only a limited operation each year. A more valuable suggestion is that the Standing Finance Committee might get to work considering some of the estimates as early as January, and thus substantially shorten the discussion in Supply after the Budget speech.

We have said that Dr. Jennings appears to consider the practice of delegating legislative powers as a *chose jugée* ; but his chapter on that subject is interesting for a special reason. In it he deals with the position of a not wholly imaginary Government which is determined to effect a "constitutional" revolution. It should follow the models of the Emergency Powers Act, 1920, and the National Economy Act, 1931. By a temporary amending Act, the Act of 1920 could be adapted to "prevent sabotage by a minority" of the main revolutionary schemes ; while the Act of 1931 could be used as a model to authorize the "transfer of existing capitalist enterprises to public control." The analogy between such a Bill and the Economy Act of 1931 is not too clear ; but one of the clauses to be included in the Bill is certainly a strange proposal to come from an author who professes to write as a constitutional lawyer. For it is to be "a provision for setting aside by resolution of the House of Commons any decision of the courts to the effect that an order" (presumably made under the Bill) "was *ultra vires*" (p. 115). This is, indeed, an advance on the Parliamentary Papers Act, which, after all, only protected Parliament, not the Executive.

Incidentally, it may be remarked that Dr. Jennings has apparently no suggestion to make with regard to the rule, always a puzzle to the uninitiated, which (in the absence of special provision) automatically wipes out any Bill not presented for the Royal assent before the close of a session, notwithstanding that a vast amount of time and labour has been expended upon it by the same Parliament. It would be interesting to know whether this rule is more than an historical accident, due to the fact that, until comparatively recent times, all the Acts of a session were (and still formally are) treated as a single statute.

A re-reading of this review suggests that it may be regarded as critical rather than appreciative. If this be so, it is not in accord with the writer's intention. In his view, the value of the book is substantial; and its value is enhanced by its clear and trenchant style.

EDWARD JENKS.

THE SYSTEM OF COMMISSIONS IN THE FRENCH LEGISLATURE.[1]

SIR COURTENAY ILBERT, in his *Legislative Methods and Forms*, glanced at the French system of referring proposed laws to standing commissions. Professor Joseph-Barthélemy has now expounded in a lucid and lively essay the genesis and operation of these bodies, the method of selecting members, the sittings in private, the crystallization of the group's views for or against a proposal, and the eventual formulation and support of those views before the whole House by a representative chosen to act as *rapporteur*. The essay explains that the Senate has eleven such commissions; the Chamber of Deputies has twenty of major importance, severally covering such subjects as foreign affairs, finance, health, labour, agriculture, mining, the army and navy, merchant shipping and so on, not to mention a few minor commissions for matters like universal suffrage, postal services or pensions. Ilbert was ready to concede that the details of a Bill were likely to receive more effective examination before a small committee than in a committee of the whole House and that the practice of submitting a reasoned report on each Bill would provide valuable information which is too often lacking at Westminster. On the other hand an Englishman is puzzled to find that in France a Finance Minister may see his budget completely transformed by the action of the commission of finance—a result not easily reconciled with the idea that the French Government is responsible for the national finances. The comparative aspect is well treated by the author. He had exceptional qualifications for writing this masterly book. He is not only a distinguished professor of constitutional law, but also an ex-deputy who has been vice-president of the commission of foreign affairs and president of that of universal suffrage. Knowing his subject from practice as well as theory, he can tell us, for instance, that a commission is in fact able to initiate legislation, notwithstanding contrary statements in textbooks.

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[1] *Essai sur le Travail Parlementaire et le Système des Commissions*, by Prof. Joseph-Barthélemy. (Paris: Librairie Delagrave.) Frs. 50.

In England, he remarks, there are commissions but there is no system of commissions. To him our parliamentary method is an inorganic development which dooms us to bureaucracy and puts members of Parliament at the mercy of the Government. This may remind us that in 1917 Lord Haldane's Machinery of Government Committee thought that, to balance the increasing efficiency of departments, standing committees of Parliament should take a special interest in the various departmental activities. More recently the Committee on Ministers' Powers recommended a similar check on departmental legislation. Our nearest approach to a commission in the French sense is perhaps the periodical Joint Select Committee on Consolidation Bills ; it scrutinizes the proposals line by line and presents a report to which Parliament pays respect. Of Royal Commissions and committees, appointed to advise upon specific changes in the law, we have plenty ; the Joint Committee on Indian Constitutional Reform is a conspicuous instance. And when in 1929 the late Earl Russell piloted through the House of Lords the Mental Treatment Bill, largely based on the report of a Royal Commission of which he had been a prominent member, he was acting almost as a *rapporteur*. Professor Joseph-Barthélemy notes the success of the British method in the prompt passing of the second Finance Act in 1931 to restore the budgetary situation. He would admit that in France a different method has different results, but he does not envy our House of Commons its impotence in financial control. Our Estimates Committee does its best in an atmosphere clouded by uncertainty as to questions of policy. Our Public Accounts Committee examines the lock on the stable door when the horse has been stolen. Our Chancellor of the Exchequer discloses on Budget Day his well-kept secrets of taxation to an audience which, because of technical rules and non-access to statistics, cannot easily criticize his plan or press alternatives. Professor Joseph-Barthélemy prefers for France the French system of commissions. It may be imperfect, he concludes philosophically, but political science is not so much the simple option between good and bad as the art of choosing between greater and lesser evils.

C. T. C.

THE CONSTITUTION OF THE EMPIRE.

PROFESSOR KENNEDY has given us a valuable and interesting supplement to his well-known treatise on *The Constitution of Canada* by reprinting seven articles and addresses which he has written of recent years.[1] They cover topics of great interest, the nature of Canadian federalism, the disallowance of provincial Acts in the Dominion, the mode in which the

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[1] *Essays in Constitutional Law*. By W. P. M. Kennedy, Professor of Law in the University of Toronto. (London : Humphrey Milford, Oxford University Press, 1934.) Pp. xv + 183. 8*s*. 6*d*. net.

Dominion constitution has developed, and the comparison of certain aspects of Canadian and Australian federal constitutional law. Of more general application are studies of the constitutional law of the Empire in relation to theories of law, of the Imperial Conferences, and of the Statute of Westminster and its interpretation.

Needless to say, there is much of interest in all these essays both for the expert and for the general reader. Professor Kennedy's nationalism is not incompatible with a realization that Canada within the Commonwealth has far greater potency for good than Canada in isolation. The same good sense induces him to recognize (p. 147) that, granting that legally the federation rests on nothing in the nature of a treaty, despite the language of some of the fathers of federation, it would be impossible for the federation to obtain constituent powers without the assent of provincial opinion. His strictures on the feeble character of the revision of the royal instructions (pp. 136 and 158) are unanswerable; it would have been far wiser to postpone change if drastic restatement were not intended. A curious light on the proposed tribunal to settle inter-imperial disputes is thrown by the evidence (p. 131) of the general dislike of the project in Canada. It raises inevitably the question, How does it happen that agreements are arrived at without dissent at the Imperial Conferences which never bear fruit? The issue was not hastily posed, and there was no compulsion on any party to the Conference to accept it if it were not really desired. But Professor Kennedy himself (p. 174) contemplates the creation of a permanent Commonwealth Court to which questions of the interpretation of the Statute of Westminster may be referred. It is unquestionably desirable, and preferable to the Courts *ad hoc* contemplated in 1930. Many other issues of great importance are touched upon, including that of nationality, once more raised in the Irish Free State by the Bill to extend citizenship, but space forbids further discussion. One regret only is possible, that "dominions" is used of the self-governing Dominions at a time when British Acts of Parliament have at last adopted the sensible convention of distinguishing the narrower sense by the use of the capital. No doubt the choice of term is inadequate, and the King's title in the Latin form even more than in the English requires revision. Yet agreement on any other style would be difficult, as was found in 1907 when the present term was chosen.

A. B. K.

DOCUMENTARY CREDIT.

DR. JEAN DEMOGUE has made a valuable contribution[1] to a branch of English law which is only just beginning to attract the attention which its enormous practical importance and very real legal interest demand for it, viz. the banker's documentary credit. A proper appreciation of this subject requires a firm grasp of the exceedingly complicated business mechanism of which it forms a fundamental part, and also a wide knowledge of law since there are involved negotiable instruments, documents of title, banking law, the law of carriage and insurance, pledge, equitable charge and hypothecation. Dr. Demogue has obviously taken pains to acquaint himself thoroughly with the business aspects of the matter, while his statements as to the English law involved are for the most part sound.

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[1] *Le Crédit Documentaire en Droit Anglais.* By Jean Demogue, Docteur en Droit. (Paris: Rousseau & Cie., 1934.) Pp. 339. Frs. 40.

The work provides a useful companion volume to Professor H. C. Gutteridge's *Law of Bankers' Commercial Credits*, to which the author is clearly very much indebted. In the much greater space at his disposal Dr. Demogue is able to present a closer analysis both of the practical and legal working of the machinery than was within the compass of Professor Gutteridge's study, and to illustrate and reinforce it with a copious and well-chosen selection of the documents which are actually used in connexion with these credits. This collection indeed forms one of the most valuable features of the volume and cannot fail to be of service to all desirous of making a serious study of the subject. The author is also able to make more extended references to the comparative aspects of the law, more particularly in relation to French and American jurisprudence. This side of the work is, however, somewhat patchy and incidental.

The plan of the volume is to provide at the commencement a detailed examination of the practical work of financing commerce by means of letters of credit, including a careful analysis of the operations involved, the various types of credit in use and the securities required from their customers by the banks issuing the credits. This part in particular contains an able statement of the law relating to the various mercantile instruments, especially the bills of lading and policies of insurance which are the typical documents required under these credits. The whole of this analysis, which has to do with many disputed and difficult problems, is conducted from a strictly legal standpoint, and is much more than an essay in descriptive economics.

In Part II, Dr. Demogue proceeds to a discussion of the juridical aspects of these credits. He deals ably and lucidly with the various attempts which have been made here, on the Continent and in the U.S.A. to fit this system in with legal theory. Despite the difficulties involved, he is himself disposed, as far as English law is concerned, to accept the offer and acceptance basis for establishing liability between banker and beneficiary under confirmed credits, and such case law as exists supports him. He rather shirks, however, the difficulties arising from the doctrine of consideration which press particularly hardly upon this theory. At the same time he gives an interesting account of the attempts which have been made to fit these credits into foreign legal systems, where the task has proved at least as troublesome. It is rather curious that he should have overlooked Professor Gutteridge's inverted agency theory. In this part of the volume also the practical and legal differences between confirmed and unconfirmed credits are made clear.

Part III deals with the legal relationships between the various parties to the credit. A good deal of this is descriptive, but it is combined with a careful analysis, and in particular contains a useful chapter on the quantum of damage in cases where the banker wrongfully repudiates his obligations to pay or accept drafts, a subject which bristles with difficulty.

Finally, in Part IV there is an elaborate and valuable treatment of the trust receipt, a document which under various names plays an important part in the later stages of this type of finance. In some ways this is the best part of the book. The authority here is scanty, and the close analysis which Dr. Demogue provides in the light of the terms of a normal form of trust receipt is therefore of particular value.

The book has one serious defect, and one which in another edition could be easily remedied. It has been very cursorily revised, if revised at all, and it abounds in small errors. Particular pains should have been taken over revision, since the French compositor had to set up a good deal of English. The names of the parties to the cases cited are spelled wrongly as often as not, and the mistakes in English are numerous, e.g. Vaughan-Williams L.J. appears on p. 293 as Lord Vaugham—incidentally Lords Justices of Appeal are all elevated to the peerage. But even the French text is full of mistakes, some more obvious than others, and sometimes serious and calculated to puzzle if not to mislead an inexpert reader, e.g. the words exportateur and importateur are from time to time interchanged, while in the specimen document at p. 256 the expression XYZ Bank is used in one place and Guaranty Trust Coy. in another for the same institution. It is a pity that such a valuable study should be marred in this way.

We have noticed a few mistakes in the statement of the English law, and it will suffice to call attention to two of these. At p. 38 there is confusion between general and particular lien. At p. 214 it is stated that the beneficiary under a confirmed credit is entitled to have his drafts paid by the issuing bank notwithstanding the latter's bankruptcy—he is of course only entitled to receive a dividend. The case cited in support of this somewhat elementary mistake (re *Agra and Masterman's Bank*, 1867, L.R. 2, Ch. 22) was concerned with a claim by the banker to set off against his liability to the beneficiary claims which he had against the customer on whose behalf the credit had been issued.

It is to be hoped that a new edition will soon be called for, and Dr. Demogue will then have the opportunity to remove the blemishes upon an excellent piece of work.

R. S. T. C.

THE GOVERNMENT OF THE UNITED STATES.

DESCRIPTIONS of the measures taken in the United States to deal with the economic situation have incidentally provided a good deal of information about the system of government and stimulated an interest in the subject for many people who had not previously given to it any close attention. At the same time popular discussion has been directed to the position and powers of the President, with the result that there has been a loss of perspective. Under such circumstances the most valuable contribution to a due appreciation of the situation is an historical survey placing current events in their due relation to the progressive development through a period of time. For such a survey a period of thirty years has been chosen by Professor White for his volume on *Trends in Public Administration.*[1] Broadly speaking, it is generally recognized that there has been a transfer of power and responsibility from local government to the State and from the State to the federal authorities. A similar movement can be found in other countries, especially in the British Dominions, and it would be an interesting study to trace the extent to which this has been influenced by the development of transport.

In the United States, long before economic conditions made their influence felt, the control of the Federal Government had been strengthened by the policy of conditional grants in aid and the necessity for an expansion of federal power over commerce. Similarly, the States have tended to increase their control over local financial operations. A notable example is in the system of education where grants in aid have been accompanied by approval and inspection by the State. State supervision has also been strengthened in matters of public health, especially during the last decade. The chief exception to this process of centralization is the movement in favour of home rule for cities.

Professor White, in an illuminating chapter on the Balance of Power, shows that the " whole social organization and existence is tending towards a wider and wider base." The motor-car, the wireless and chain stores are among the factors contributing increasingly to weld the citizens of the United States into " a homogeneous people." " We read the same magazines," he writes, " we eat the same breakfast cereal, we take the same patent medicines, we drive the same model car, we use the same soap, we attend the same movies, and millions at a time we hear the concerts of Walter Damrosch or the discourses of *Amos 'n' Andy* on the radio." Circumstances had been preparing the way for the President's call to united effort rendered necessary by the economic crisis. The foundations had been laid for the President's own initiative, which by the personality of the present occupant of the office has been impressed upon onlookers in other countries. So long ago as June 29, 1921, the President had addressed the entire " Business Organization of the United States " upon the passing of the Budget and Accounting Act which created a general manager of the federal service. From that time there has been a steady though not wholly uninterrupted development in the position of the President, with the result that in the last decade the office has become " for the first time, an effective agency of administration."

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[1] (London : Longmans, Green & Co.) Pp. x + 365. 24s.

Synchronizing with this development in the position of the Chief Executive Officer there has been a general advance in the standard of public administration. The services chiefly concerned, whether in Federal or State organization, have developed on lines which correspond to the admirably organized Civil Service in England and the corresponding services throughout the Empire deriving their inspiration from its ideals. Voluntary organizations of professional bodies are making their contribution, of which some account is given in this volume, so that it provides an admirable survey of the various activities in Federal, State and local government of particular value to a truer appreciation of the National Recovery Act and similar legislation, which have stimulated so much interest in the recent conditions of life in the United States.

C. E. A. B.

COVENANT OF THE LEAGUE OF NATIONS.

THE author of this book[1] has performed a valuable public service in bringing the critical eye of the trained lawyer to bear upon the legal status of the League of Nations and the detailed provisions of its Covenant. Whether or not the early future will see drastic changes in the constitution and powers of the League (of which at present there seems little sign), it is all to the good that the Articles of the Covenant should be probed, and their meaning and effect determined with as much precision as may be practicable.

The book emphasizes the fact that the Covenant is loosely and broadly drawn, and for purposes of interpretation requires to be looked at not through a microscope but with a liberal view, and with due regard to its whole scope and purpose. Possibly it places too much stress on the need for a method of interpretation less rigid than that which English lawyers are accustomed to apply to Acts of Parliament. An English court, if it were called upon to construe particular provisions of an Act setting up a novel scheme of things, comparable in any way with the League, would no doubt take a broad view of the purposes and provisions of the whole Act as a guide to the intention of Parliament in enacting particular provisions.

Clearly the author goes too far in saying, as he does, at p. 32 that " the Covenant must be construed with reference to the atmosphere in which it was composed and in which it has to take effect—not only the atmosphere of Paris in 1919, but the whole atmosphere of the modern world, with the baffling conflict of the principles on the one hand of the independence, and on the other hand of the interdependence, of states." We picture with some sympathy the position of the court which, in applying an Article of the Covenant to the facts of an international dispute, should seek to colour the words of the Article with a combination of all the varied hues of those atmospheres !

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[1] *Some Aspects of the Covenant of the League of Nations*, by Sir John Fischer Williams, C.B.E., K.C. (London : Humphrey Milford, Oxford University Press.) Pp. vi + 322. 10s. 6*d*. net.

While pointing out that the League is a new phenomenon and does not fit the description of state, federation or any other kind of body previously existing, the author (at p. 42) finds an interesting analogy between its characteristics and those of a corporation created by Act of Parliament or Royal Charter under English law.

Taken as a whole the examination of the Covenant from the legal aspect, which forms the main substance of the book, seems admirably done. It is penetrating and thorough, and shows the fruits of wide study and careful thought, by one well qualified for the particular task. But the reviewer naturally looks for weak spots and we think there are some propositions put forward in the book which are not beyond criticism.

For example, an important difference is suggested between the meanings of the English and French texts of Article 21. The English text provides that " Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace." The French text provides that such engagements and understandings " ne sont considérés comme incompatibles avec aucune des dispositions du présent Pacte." It is suggested at p. 63 that, whereas the English version seeks to protect the Monroe Doctrine against the Covenant, the French seeks to protect the Covenant against the Monroe Doctrine. It seems to us that, although the two texts differ in effect in some other respects, the effect of the French text is, on this point, the same as that attributed to the English.

At p. 120 the author is dealing with Article 10, which requires the members " to respect and preserve as against external aggression the territorial integrity and existing political independence of all members." He suggests that, in any case where the Assembly had, in pursuance of Art. 19, advised the reconsideration by members of a treaty, it would be very difficult to contend that measures in harmony with the reconsideration, which the Assembly had advised, would constitute external aggression within the meaning of Art. 10. We cannot think that the mere giving of advice under Art. 19, if the advice has not been accepted, can have the effect suggested. Supposing that the Assembly had advised the transfer of certain territory from State A to State B, but State A had not agreed, and so had rejected the advice, and the transfer had therefore not been carried out, could it be maintained that a violent seizure of the territory by State B would not be an aggression, and a breach of Art. 10 ?

Again, at p. 121 it is suggested that the obligation under Art. 10 to preserve the territorial integrity and political independence of a member State does not arise at once on an invasion, but only when it becomes clear, at the end of a conflict, that the invader means to stay in possession of territory which he has occupied. We cannot think that there is any justification for this view. The obligation under Art. 10 to respect the territorial integrity of members seems clearly to discountenance any invasion by violence, without regard to any question as to whether or not the invader, if successful in the conflict, should, after it is over, decide to stay in possession of the territory.

When the author puts off the robe of the lawyer and trespasses upon the sphere of the politician his work seems to diminish in consistency. At p. 50 he tells us, no doubt wisely, that " the general tendency of the ideas and events which have determined the institution of the League is towards the development of a central organ of the civilized world, the natural and necessary consequence of whose existence must be to check that unlimited power of doing what you please, which is implied by an unqualified assertion of the thing called national sovereignty," and at p. 60 he says that " some reduction of the unchecked power of tariff-making is a condition of peaceful international common life." But in various other passages he expresses less progressive views. At p. 53 he says that it is hopeless to expect communities, such as the United States or France or Germany or ourselves, to accept orders from the outside. At p. 158 he suggests that the idea of an *ex parte* proceeding before the Permanent Court is unthinkable. At p. 229 he contends that, at the stage in the development of human history at present reached, if a non-justiciable dispute is to be settled, the settlement must, in form at any rate, be accepted voluntarily by both Powers in dispute ; it cannot be forced upon them. And at p. 241 he says that " the Covenant, combined with the Pact of Paris, goes to the furthest point of the engagements which Governments can be brought to undertake for the preservation of international peace, or can expect to succeed in maintaining if once undertaken."

Those who think that common sense requires the present generation of humanity to take whatever steps are necessary for preventing their own destruction through another great war will probably wish for a little more faith, hope and imagination in the outlook of the international politician than these later quotations show, and will read with more satisfaction the pages where the author confines himself to the part of the lawyer, which he fills with great competence and distinction.

In the last chapter the author deals with certain international documents, in the nature of supplements or proposed supplements to the Covenant, namely, the proposed Geneva Protocol of 1924, the Locarno agreements of 1925, the Pact of Paris or Briand-Kellogg Pact, the Optional Clause, and the document known as " the General Act," which comes in for well-justified criticism.

There are four appendices which set out the text of : (1) President Wilson's Fourteen Points. (2) The Covenant of the League. (3) The Pact of Paris. (4) An article from *The Cambridge Law Journal* dealing with the meaning of the expression " resort to war."

F. N. KEEN.

THE UNITED STATES AND THE LEAGUE OF NATIONS.

THIS reprint of a course of lectures [1] given at the Graduate Institute of International Studies in Geneva provides an admirably clear and instructive account of what has come to be regarded as one of the outstanding paradoxes of recent international history. The most valuable chapters are undoubtedly those in which Professor Berdahl recounts the sordid tale of political intrigue and misrepresentation leading to the overthrow of " Wilsonism " in 1921 and the subsequently inevitable drift towards collaboration with the various organs of the League. Considerable light is thrown on the methods of communication in the early days when the tactics of " snubbing " were carried to ludicrous lengths by the Department of State. This period has long since passed, and Professor Berdahl renders a great service in showing how broad the channels of collaboration have now become. Whether collaboration from without is destined in the near future to become participation from within the League will in all probability depend on the strength of a Presidential initiative. This study at least shows that the development would be in line with a traditional and widely supported objective of American foreign policy.

S. H. BAILEY.

NATIONALITY AND THE PEACE TREATIES.

THIS book [2] discloses a tragic story of muddle in Europe resulting directly or indirectly from the vast transfers of populous territories from one State to another and the creation of new States under the peace settlement at the end of the Great War. It shows the way in which various causes have contributed to this condition of muddle. To begin with there are differences between the laws and practices of the different countries with regard to the qualifications and tests for possession of the nationality of those countries. Then come the various Peace Treaties and the Treaties and Declarations for protection of Minorities, with conflicting provisions, or harsh or unwise provisions, or lack of sufficient provisions as to change, retention or choice of nationality. New complications are introduced by post-war conventions made between particular States to regulate certain nationality questions. And finally we have further conflicts and complications due to the national laws enacted and the national policies pursued by the various States in regard to the matters dealt with in the treaties and conventions.

The net result of this tangled business appears to be that vast numbers of people in various countries have, without any fault of their own, been subjected to grave difficulties and anxieties through being either legally " stateless," or unable to induce any State to acknowledge them as its nationals, or being the unhappy possessors of more than one nationality or the victims of unresolved doubts and controversies as to their legal position in respect of nationality.

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[1] *The Policy of the United States with respect to the League of Nations.* By Clarence A. Berdahl. (London: Humphrey Milford, Oxford University Press.) Pp. 129. 8*s.* 6*d.*

[2] By William O'Sullivan Molony. (London: George Allen & Unwin Ltd., 1934.) Pp. 278. 7*s.* 6*d.* net.

The book describes how, since the war, many associations and public-spirited individuals, moved by sympathy for the plight of these unfortunate people, have tried to get the position improved by co-operation between the governments concerned or action by the League of Nations, but without much success or satisfaction. The difficulty of getting any reasonable settlement has been increased by conflicts of national interest, political policy and racial feeling between the countries concerned.

The parts of the book in which Mr. Molony describes the complex web of provisions of treaties, conventions, laws and decrees which have given rise to these difficulties are not too easy reading. Whether it would have been possible to arrange the material so that the reader could more easily get a comprehensive grasp of it we can hardly judge. The description, as given, will tempt the reader to condemn in no measured terms the statesmanship which arranged the vast resettlement of territorial interests in Europe after the war in a manner so pregnant with international difficulties and individual hardships ; and to condemn no less the failure of statesmen during the period since the war to find any sufficient remedy.

One cannot read these pages without deploring the failure of the Conference held in 1930 at the instance of the League of Nations to endeavour to arrive at an agreed code of international law upon three subjects, one of them being nationality. To obtain some common basis which will unify or harmonize the principles and rights of nationality recognized by the various countries in the world, and will incidentally solve the problem of the stateless persons in Central Europe, is an urgent need. Mr. Molony's book forms a strong argument for the creation of some means of enacting international laws on subjects of this kind, with regard to which international agreement cannot be obtained and disharmony causes so much trouble. An obligation ought also to be accepted by nations to bring their national laws into accord with the international position.

There are some preliminary chapters dealing generally with nationality and statelessness, the drawbacks of the latter, the treatment of nationality questions under treaties in pre-war years, and the European position when the Peace Treaties were arranged.

We have looked in vain for one thing which would have been interesting, but was presumably impossible to give, namely, a definite estimate of the total number of people in Europe who have been rendered stateless as a direct or indirect result of the war and the peace settlement ; and of the number who still remain in that condition. There is a vague reference at p. 28 to " those hundred thousands " who are in a position " very often less happy than that of the slaves of the past," while at p. 30 we are told that, taking the world over, the number of cases of double nationality, statelessness and contested or doubtful nationality " might well run into several millions."

F. N. KEEN.

FEDERATIONS.

WHATEVER may be the case elsewhere, it is clearly true that in India in the sphere of government the future belongs to federalism, and the University of Bombay has done well to assist in the publication of a useful summary[1] by Mr. D. G. Karve, of Fergusson College, Poona, of the nature and characteristics of federations. Yet in the brief period since this work appeared the trend of events has been decidedly unfavourable to the federal ideal. Germany has virtually substituted a unitary system for the weakened federalism of the Weimar constitution, and the new régime leaves no place for the supremacy of the courts which might have evolved from the principles of Weimar. In Canada economic pressure has proved that the federal constitution is not adequate to meet modern economic conditions; in Australia one State has presented to the British Government and Parliament a petition for the dissolution of the federal tie, and one great political party has declared federalism outworn and a hindrance to social progress. Yet consolation may be drawn from the fact that in the United States and Switzerland federalism still flourishes, and that in the former recent events have proved that it can be so interpreted as not to act as a barrier to effective action in the case of emergency. Moreover, as Mr. Karve's study brings out, federalism permits of much variety of type, and India, it is certain, will have a form which has no parallel elsewhere. This fact, however, does not detract from the utility of Mr. Karve's sketch. It is both readable and accurate, and should serve to render simple the appreciation by those interested in politics in India of the essential features of federalism.

A. B. K.

THE TREATY OF TRIANON.

LORD NEWTON, who writes a preface to this little book[2] by the former Prime Minister of Hungary, states that this is the era of propaganda, and all the smaller European nations, and some of the greater, are engaged ceaselessly in putting their cases before the world. This book, which contains four lectures delivered in London in 1933 by Count Bethlen on the subject of the Hungarian problem, is undisguisedly propaganda—the statement of a case for the revision of the treaty which, at the end of the war, truncated the kingdom of Hungary. The author makes a passionate appeal both for a territorial readjustment which would restore to Hungary the two million of the three and a half million Hungarians that have now been placed under foreign rule, and for according the right of self-determination to those nationalities—the Ruthenians, the Slovaks, etc.—who were formerly under her rule.

In the first of the lectures he gives a learned account of the race question in the Danubian countries; in the second he examines the provisions of the Treaty of Trianon in its relation to the small nationalities in the Danube Basin, and charges the makers of the treaty with amateurish work. In the third he analyses the special problem of Transylvania, and urges that its solution requires the treatment of that country as a separate state which would give a chance for reconciling the two races—the Rumanians and Hungarians.

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[1] *Federations: A Study in Comparative Politics.* By D. G. Karve, M.A. (London: Humphrey Milford, Oxford University Press, 1932.) Pp. xv + 318. 4*s.* 6*d.*

[2] *The Treaty of Trianon,* by Count Stephen Bethlen. (London: Longmans, Green & Co., Ltd.) Pp. 187. 10*s.* 6*d.* net.

In the last lecture he considers the threat to the European peace involved in the provisions of the treaty: and attacks the treaties of the Little Entente as violation of the principles underlying the League of Nations. They were, he said, framed entirely upon the model of pre-war alliances, with a view to the perpetuation of the *status quo* created by the peace treaties. The Hungarians, he says, await and "accept with religious belief the arrival of a peaceful and just revision of the treaty." One may doubt whether, in his words, "true altars of the people's Christian belief, Christian love and serious reconciliation may be erected"; but the case for revision of the treaties as a means to better understanding appears to be well founded. Some time or other the European states will have to get together for a territorial and economic clearing, but that clearing will have to take account of the complex relationships of all the Central Powers.

N. B.

TREATY-MAKING PROCEDURE.

Mr. Arnold has collected together a most useful series of statements on the procedure for treaty-making of nearly fifty States.[1] Many of the statements have been officially approved by the governments concerned. The volume, which is issued under the auspices of the Royal Institute of International Affairs, also contains an admirable note on "Constitutional Limitations upon the Treaty-making Power," by Dr. Arnold McNair. Of especial value is his survey of relevant cases and precedents in a discussion of the extent to which one contracting party is deemed to be cognizant of municipal provisions affecting the treaty-making power of the other and of the extent to which the latter can be held to a treaty in relation to which any of these municipal requirements is lacking.

S. H. Bailey.

COPYRIGHT.

The question, how far and in which way an author ought to be protected by the law in respect of his works, raises a problem which cannot possibly, by its nature, be confined to national legislations; and there have been already some international conventions to govern its solution. The problems involved are numerous and difficult. Even the nature of the right of the author is a matter of controversy. Mr. Olagnier's book,[1] published at a time where a further step in the matter, *i.e.* the unification of the Conventions of Berne and of Havana, is contemplated, calls therefore for special attention, and will not only be welcomed by French lawyers.

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[1] *Treaty-making Procedure.* A Comparative Study of the Methods obtaining in Different States. Compiled by Ralph Arnold. (London: Humphrey Milford, Oxford University Press.) Pp. vi + 69. 4*s.* 6*d.*

That Mr. Olagnier's book is the outcome of many years of study is not only asserted in the Introduction, but it is clear from the amount of documentation used, which makes of the work an exhaustive treatise upon the matter. Mr. Olagnier indeed not only describes the present French law of copyright, but he gives also an account of its history ; he proceeds moreover to deal with international conventions and bodies of foreign legislations on the same subject.

The French Civil Code contains no article to settle the questions arising from a copyright ; such questions were in 1804 left to be governed to the provisions of antecedent legislation. It has, however, been a matter of great difficulty to apply the general provisions of the Civil Code to copyright since this could not be conveniently regarded either as moveable nor immoveable, in accordance with Art. 516. The French Court of Cassation, however, has taken no account of the special nature of a copyright, and it has treated the right of an author in the work he produces as simply in the nature of a private right of ownership of a moveable. Mr. Olagnier rightly criticizes this method and points out how unfortunate the results to which it has led have proved for the authors. But perhaps Mr. Olagnier's criticism is somewhat one-sided, and his attention is too exclusively directed to the point of view of the authors. He does not seem to pay sufficient consideration to the other interests to which the interest of the author is opposed. These are not only, as his work might induce us to believe, the interests of big firms of publishers. An objection, therefore, might perhaps be raised against Mr. Olagnier as a legislator ; but this does not impair his merits as a lawyer. His statement and exposition of the cases, from the point of view of the existing law, appears to be unobjectionable. The English reader will particularly appreciate the method, of scanty use in continental legal writings, according to which Mr. Olagnier has proceeded by analysis of the leading cases on the matter. The facts of each case, and the decision of the court, are reported at full length, and the book, being thus full of life, is at the same time interesting and pleasant to read.

R. D.

ROMAN LAW IN MODERN PRACTICE

THIS little volume[2] contains the Tagore Law Lectures delivered by Professor Mackintosh in the University of Calcutta in 1933. The first six lectures give a rapid summary of the growth of Roman law, of its codification by Justinian and of its diffusion throughout the modern world. In the last six chapters cases are selected for comment from the Scottish and English Reports, in which recourse has been had to the law of Rome in the principal departments of the private law. Professor Mackintosh has some valuable remarks on the educational value of Roman law, and insists on the importance of studying the texts of Gaius and Justinian.

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[1] *Le Droit D'Auteur.* By Paul Olagnier, Docteur en Droit, Avocat à la Cour de Paris. (Paris : Librairie Générale de Droit et de Jurisprudence, 1934.) Vol. i, pp. vi + 263 ; vol. ii, pp. vii + 391.

[2] By James Mackintosh, B.A., LL.D., K.C. (Edinburgh : W. Green & Son, 1934.) Pp. xii. + 202.

" These texts lie within a short compass, and are fairly readable and interesting as they stand ; and they do not readily lend themselves to the soul-destroying arts of abridgment and compression. Most of the abstracts which are produced for cramming purposes are technical to the point of unintelligibility ; dull and depressing to the last degree, they are calculated to rob what can be made an attractive study of all interest and respect."

Professor Mackintosh has supplied an excellent introduction to the study of Roman law. A student beginning his Roman law cannot do better than master the contents of this book, which he will find informing and stimulating.

R. W. L.

INTERNATIONAL CRIMINAL JURISDICTION.

THE author gives, in his first chapter,[1] a survey of the efforts to create an international criminal jurisdiction. He discusses the proposals made by Baron Descamps and the International Law Association as well as the publications of Pella, Donnedieu de Vabres and many other writers on this subject. Although he, obviously, aims at giving the matter an unbiased consideration, he cannot conceal his opposition to most of the hitherto existing schemes. So far he is in agreement with Professor Brierly in his essay in the *British Year-Book of International Law*, 1927.

In his second chapter he examines, without reference to his predecessors, the question whether an International Criminal Court is needed and answers it in the affirmative as regards certain kinds of disputes, chiefly violations of the law and customs of war and of the rights of minorities. He denies the need of such a court, however, for the purpose of securing a uniform interpretation of general criminal statutes or for the trial of international criminals. Since he recognizes, therefore, a limited need of an international criminal jurisdiction, he feels called upon, in his third chapter, to present the draft of such a system. Starting with the substantive law, *i.e.* the international crime, he gives an analysis of the conception " aggressive war." His remarks on this point are very pessimistic. He maintains that, under the present state of armaments, it is impossible to find any real signs of an imminent aggressive war. Only after a general disarmament, he writes, would it be perceptible which

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[1] *Internationale Strafgerichtsbarkeit*, by Prof. Dr. H. von Weber. Völkerrechtsfragen, Max Wenzel, 40 Heft. (Berlin and Bonn : Ferd. Dümmlers Verlag, 1934.) Pp. 176. RM.8.

State was the aggressor ; only then would it be practicable to prohibit preparations for an aggressive war. In addition to general disarmament the author brings forward another demand : since International Law can endure only as founded upon justice, the treaties of peace must be revised. " The maintenance of a certain legal position of international affairs is not desirable as such, but is dependent upon the value of this position and upon the question of how near it comes to the ideal of justice " (p. 89).

The author proceeds to deal with the system of international punishments, and with the organization and procedure of the International Criminal Court. He lays great stress upon the fact that there is to-day no power able to execute the sentences of such a court. The creation of such a power is, in his opinion, not feasible. He considers, therefore, an international criminal jurisdiction at present as only a danger for the weaker States, because it might be only against the latter that its sentences would be executed. This pessimistic view contrasts with the optimism expressed recently by Sir F. Maurice in his review of Lord Davies' *Force* (*The Observer*, October 21, 1934). The latter writes : " I find it hard to believe that it is beyond the art of statesmen to devise such a tribunal as Lord Davies proposes, and that done, I am convinced that the creation of an international police force to be the servant of the tribunal is far from being impracticable." Professor von Weber, however, is strongly of opinion that we must content ourselves with much more limited measures. His own proposals aim at the creation of an organization which may represent world-publicity (" *ein ' Organ der Weltöffentlichkeit* ' "), *i.e.* a committee for observing certain trials which may be of international importance, and for registering its opinion on the question whether the whole procedure was administered in due order and whether the sentence did justice according to the proved facts. The author mentions the missions which were appointed by the Entente to attend the trials of the war criminals before the German Supreme Court. By this method, he states, could be effected the efficient control of the society of nations over the administration of criminal justice in particular States. He proposes, furthermore, to establish non-permanent commissions for the investigation of alleged violations of international law, similar to those already established in former cases.

HERMANN MANNHEIM.

A WAY TO SOCIAL PEACE.

THIS little book [1] contains the Halley Stewart lecture 1933. The subject is one which assuredly engages the attention of all, though it is outside the usual scope of our Society's activities. As, however, the book has been sent to us, a few words may be said.

Mr. Wickham Steed is disturbed, as, indeed, are many others, at the threat to freedom of human expression and development presented by modern schemes of State dominance in the economic sphere involving the elimination or rigid restriction of private use of capital and labour. How far these fears are justifiable may, of course, be disputed, but few will deny that the omens are not auspicious, whether they be sought in Russia, Italy, Germany or elsewhere. Mr. Steed, as we are all aware, has made his fame in other fields, but he is no novice in that of economics, and he gives an interesting account of his relations with some of the nineteenth-century Marxists and Socialists. He seeks in his lecture to recommend some better way of determining the relations of Capital and Labour than that of class struggle and victory by violence or by the pressure of organized party.

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[1] By H. Wickham Steed. (London : George Allen & Unwin, 1934.) Pp. 148. 4*s*. 6*d*.

He finds inspiration in the principle that the human factor in industry should be recognized as superior to the factor of Capital, or, as Abraham Lincoln phrased it, " Labour is the superior of Capital and deserves much the higher consideration."

In practice this must mean that it is to Labour, not to Capital, that the surplus profits of production must belong. How this principle can be and has been applied in fact and with what happy results he shows more particularly by reference to the working of the Company Empowering Acts of New Zealand.[1]

F. M. G.

STERILIZATION.

THE practical value of comparative legislation is well illustrated in a little book by Mrs. Hodson in which she surveys the present position in various countries which have legalized sterilization. *Human Sterilization To-day*[2] is frankly the work of an advocate who finds in sterilization a constructive measure to combat faulty heredity. California was one of the earliest States to pass a sterilization law applicable to the inmates of mental institutions so that experience of its operation, with amendments considered desirable, now extends over a quarter of a century. Mrs. Hodson claims that the operation is now regarded " as a kind of first-class award " for those whose conduct in the institution had led them to hope for discharge, to which the operation would be a necessary preliminary. She found among mental specialists, judges, probation officers and other social workers a general consensus of satisfaction with the successful working of the sterilization system. Denmark was the first country in Europe to pass sterilization legislation. In that country it is applied primarily to the feeble-minded, and every operation, after consent has been given by the patient and guardians, must be sanctioned by the Minister of Health and the Minister of Justice. In Switzerland sterilization had been carried out without legal enactment before the law in the Canton de Vaud was passed in 1929. It came into use there as a definite form of medical treatment in dealing with the problem of mental disease. The whole basis of the procedure is that the operation is only legal on therapeutic grounds. Legislation in Germany and other countries, including two Canadian Provinces, is included in the survey. In England the operation is carried out with the consent of the parties, and Mrs. Hodson quotes with approval a proposal to place voluntary sterilization on a legalized basis as then " not only would the poor be able to obtain facilities for the operation, the surgeon would be relieved of the stigma and risk of undertaking what many persons consider to be an illegal operation, and voluntary hospitals would also be enabled to provide beds for poor persons without the risk of alienating their subscribers." This is not the place to enter into a discussion of the controversial question raised in this quotation, but it is sufficient to suggest that the legal aspect of the matter is one which requires further elucidation before there can be any general consensus of opinion among either medical or legal authorities in favour of legislation on the subject. In the meantime, medical practice is developing to meet the needs of the patients in a way analogous to the use of anæsthetics for maternity patients, which at first was received by violent outbursts of opposition from ignorance stimulated by unreasoning prejudice. Experience of the value of the advance of medical knowledge will influence public opinion in favour of this in the same way as of other therapeutic measures, which have met with opposition.

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[1] *Journ. Comp. Leg.*, Third Series, vol. viii, pt. i, pp. 146–8 ; pt. ii, p. 159.

[2] (London : Watts & Co.) Pp. vii + 55. 1*s*.

C. E. A. B.

NATIONALITY.

THOUGH both Congress and the courts have been very busy producing laws and interpretations of laws relating to nationality, during the last thirty years, no book since those of Van Dyne in 1904 and 1907 has dealt comprehensively with the law of citizenship in the United States. Until Dr. Luella Guettys' book [1] appeared recently, it was necessary to rely on the incidental treatment that was available in books on the Constitution of the United States, such as those by Burdick and by Willoughby, or on the particular treatment of special subjects, such as was found in *Marriage and the Civic Rights of Women*, by Sophonisba Breckinridge. Now, the key to the solution of any problem relating to the acquisition or loss of United States citizenship may be found in one book.

The answers to such difficult questions, relating to the acquisition of citizenship in the United States, as " Who is a ' free, white person ' ? " " Where is ' in the United States ' ? " and " What is ' good moral character ' ? " are discussed with pleasing simplicity. Lucidity and conciseness, judicious use of historical background, careful sifting of public documents, statutes and decided cases are notable features of this little book : one is glad to find that the author is willing to present both sides of a doubtful point and does not feel bound to express a dogmatic rule where decided cases are conflicting.

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[1] *The Law of Citizenship in the United States*, by Luella Guettys, Ph.D. (Chicago: University of Chicago Press; London: Cambridge University Press). Pp. xxii + 221. Price 13*s*. 6*d*.

However, it is only fair to note that Dr. Guettys has not been as careful in seeking original sources on foreign law as she has on the United States law. Thus in dealing with the effect of marriage on nationality she has relied on the Harvard Research of 1929,[1] whereas to my knowledge the law has since been amended in both Canada (1932) and Great Britain (1933), and has probably been amended in other countries as well. Nevertheless, the illustrations are sufficient to show how cases of statelessness and dual nationality arise through conflicts between the nationality laws of the United States and those of other countries. It is noted that, between 1907 and 1931, 8,415 certificates of naturalization were cancelled. How many cases of statelessness must have resulted from these cancellations!

It is significant that this book was written with a view to a pending proposal for the systematization of the citizenship laws. The author is fully aware of the confusion, illogicalities and hardships involved in the present law. Many of the hardships resulting from the Cable Act, 1922, have been removed by piecemeal legislation, as Dr. Guettys notes. But, as she very properly asks, why should a highly educated and most desirable Japanese be ineligible for naturalization, while a " white person " of doubtful civic worth is eligible ? Why should a person be excluded from naturalization because he puts his allegiance to God before his allegiance to the United States ?

Such interesting political questions, as well as such legal and practical ones as " When is citizenship acquired by birth ? " and " What steps are necessary to naturalization ? " are neatly considered in this admirable book. A great deal of most useful information is intelligently compressed between its covers, and it should find a permanent place on the shelves of law libraries throughout those countries where the principles of English law prevail.

F. A. V.

LEGAL REFORM IN GERMANY.

THE main object of legal reform in Germany, we are told, is to re-create a genuine interest among the people at large in the legal order. This pamphlet,[2] No. 7 among the *Schriften der Akademie für deutsches Recht*, concerns itself with an inquiry as to what enlightenment may be obtained from a study of English legal methods in suggesting the direction which activity to this end should follow. A hopeful issue for such an inquiry might be anticipated from the general character of English law, since the latter is developed by decisions of national courts, is traditional and has, in its origin, Germanic affinities. There follows an acute and intensely interesting examination of English legal methods directed to bring out the distinctive features both of the working of our Case law system and of our treatment of Statute law. This inquiry is based mainly on recent material. Much attention is given to the case of *M'Alister* v. *Stevenson*,[1] and the judgments of Lord Buckmaster and Lord Atkin are carefully analysed so far as they throw light upon the problem. Frequent reference is also made to Professor Goodhart's Inaugural Lecture on "Precedent in English and Continental Law,"[2] and some criticisms are put forward which modify the general agreement. The results of the inquiry are by no means soothing to our complacency. The prayer of the Pharisee has, it is to be feared, sometimes trembled on our legal lips and there is much in this little book to disturb faith in this assumed superiority. The tendencies and defects of our system are made manifest in an illuminating manner and on a basis of real knowledge. This is particularly the case as regards our Statute law and methods of interpretation.[3] In this connexion the writer might have pointed out how closely the traditional attitude of the English courts towards Statute law is bound up with the ancient dominance of the Common law; it is the one-time exceptional character of Statute law which explains the tendency to strict interpretation and unwillingness to make use of "*Gesetzmaterialen*."

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[1] 23 *American Journal of International Law*, Special Supplement, pp. 109–10.

[2] *Die Methode des englischen Rechts und die deutsche Rechtsreform*, by Hans Otto de Boor. (Berlin: Franz Vahlen, 1934.) Pp. 59.

It is not, therefore, through our Case law system in its modern form, still less by the form of our legislation and methods of interpretation that, according to the writer, help is to be afforded to Germans seeking to relate their law more closely to life. Such help is, however, given by a study of the way in which an English court is accustomed to state the facts of the case before it. The writer is lost in wonder and praise at the direct and effective manner in which the facts are presented in the typical English judgment so that the law applied is made to furnish an answer to a problem of life. "Some of the best examples of this process," he says, "might almost form part of a realistic novel." English judgments being thrown into this form lend themselves easily to publication in the newspapers; they make good news and can be read with interest and appreciation by laymen. Here our author finds the secret of the popular feeling for law in England. Men come to realize the law, not as an abstract external system, but as something which is being presented day by day to them as a series of answers to problems raised by common life.

The whole pamphlet will well repay study. Whatever its value may be for the German reader, its perusal cannot fail to be profitable to English lawyers.

The few errors in English references are more than pardonable in a German work. "Lord St. Meovards," in footnote 5, on p. 5, should obviously be "Lord St. Leonards"; "Professor Goodhart" frequently figures as "Professor Goodhard," and some of the references to cases are misquoted. But these are trifling mistakes.

F. M. G.

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[1] [1932] A.C. 562; 48 T.L.R. 494.

[2] 50 L.Q.R. Pp. 40 ff.

[3] See also the article by Professor Smith in *Journ. Comp. Leg.*, Third Series, vol. ix, pt. iv, pp. 153 ff.

LEGISLATION BY RICOCHET IN AMERICAN CONSTITUTIONAL LAW.

THE American constitution inflexibly decided the limited targets at which the federal legislature might fire. Congress, ranging its batteries at these prescribed targets, has managed to score an occasional bull's-eye on the adjoining targets which the constitution had reserved for the legislatures of the several States. So much for the ballistic metaphor which appears in the title of Dr. Chan Yan-chun's essay[1]; here are explanatory examples. Congress has a limited power over postal matters and thereunder has legislated against the transmission of lottery tickets. It has a limited power of taxation and thereunder has entered the field of public health, morals and industry by taxing white phosphorus matches, opium and the products of child labour. It has a limited power of regulating inter-State commerce and thereunder has passed laws like the White Slave Act and the National Motor Vehicle Theft Act. This overlapping and flexibility, counteracting (so far as the law courts allow) the rigidity of a constitution awkward to change, give Dr. Chan Yan-chun a topic for an interesting study.

C. T. C.

We have also to acknowledge:[2]

The Permanent Court of International Justice. By Manley O. Hudson. (London: Macmillan & Co., Ltd.) Pp. xxvii + 731. 21*s.*

Studies in Systematic Political Science and Comparative Government. Vol. III. *The State as a Concept of Political Science.* By Frederick Mundell Watkins. (New York and London: Harper & Bros.) Pp. 84. $2.

Samuel Pufendorf's De Jure Naturæ et Gentium Libri Octo. 2 Vols. Ed. by James Brown Scott. (London: Humphrey Milford, Oxford University Press.) 63*s.*

The First Century of British Justice in India. By Sir Charles Fawcett. (London: Humphrey Milford, Oxford University Press.) Pp. xix + 269. 15*s.*

Wolff's Jus Gentium Methodo Scientifica Pertractatum. 2 Vols. By Joseph H. Drake. (London: Humphrey Milford, Oxford University Press.) 36*s.*

World Court Reports. Vol. I, 1922–1926. Ed. by Manley O. Hudson. (Washington, D.C.: Carnegie Endowment for International Peace.) Pp. xxix + 777. $5 the set.

Staatslehre. By Hermann Heller. (Leiden: A. W. Sijthoff's Uitgeversmij N.V.) Pp. xvi + 298. H.fl. 5.25.

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[1] *La Législation par Ricochet dans le Droit Constitutionnel Américain.* By Chan Yan-chun, Docteur en Droit, pensionnaire de l'Institut Franco-Chinois de Lyon. (Lyon: Bose Frères, 1934.)

[2] Mention here does not preclude a review later.

Klagbarkeit, Prozessanspruch und Beweis im Licht des internationalen Rechts. By Dr. Magdalene Schock. (Leipzig: Bernard Tauchnitz.) Pp. xvi + 160. RM. 8.

Der Briefliche und telegraphische Vertrag im vergleichenden und internationalen Privatrecht. By Ernst Achenbach. (Leipzig: Bernard Tauchnitz.) Pp. 98. RM. 4.50.

Vertragsansprüche Dritter in französischen Recht. By Dr. Eduard Wahl. (Berlin: Walter de Gruyther.) Pp. ix + 227. RM. 9.

Das Wiederaufbauwerk Roosevelts, N.I.R.A.-N.R.A. By Ernest Basch. (Zurich: Orell Füssli Verlag.) Pp. 250. RM. 6.40.

Il Contempt of Court e la Specific Performance nel Diritto Inglese. By Michele G. de Rossi. (London: Sweet & Maxwell Ltd.) Pp. xx + 376. 17*s.* 6*d.*

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin Mensuel de la Société de Législation Comparée; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Gold Coast Review; Headway; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Revista de Ciencia Juridicas y Sociales; Revista de Derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; South African Law Times; South African Law Journal; Studi di Diritto Industriale; Tulane Law Review; University of Illinois Studies in the Social Sciences; Wisconsin Law Review; Zeitschrift für osteuropäisches Recht.

WILLIAM HARRISON MOORE.

By the death of Sir W. Harrison Moore the Society of Comparative Legislation has lost a valued member of the Council and the Empire a loyal and devoted servant. Upon leaving school he entered at King's College, Cambridge, and the Middle Temple where he attained distinction in the study of law. At the former he gained the George Long prize and the Chancellor's medal, and the Council of Legal Education awarded him a Barstow Law scholarship. He took his LL.B. at London University, and for a time followed his father's profession as a journalist.

Moore was called to the Bar by the Middle Temple in 1891 and, intending to specialize in commercial law, read in the chambers of the late Lord Justice Scrutton, but on account of his health was advised to seek work out of England. In 1892 he followed Professor Jenks as Professor and Dean of the Faculty of Law at Melbourne. Through all the difficult discussions preceding the establishment of the Commonwealth of Australia Moore's sound knowledge of constitutional law was invaluable. His first contribution to the *Journal* of the Society, published in 1900, was an examination of the sources of law of the colonies. His great work on the Constitution of the Commonwealth appeared in the following year, and a second edition was required in 1909. In the meantime he had published *Imperial and Local Taxation* in 1902, and *The Act of State in Relation to English Law* in 1906. His numerous contributions to periodical literature included the responsibility, with collaborators, for twenty-two years for the review of the legislation of Victoria, published in the Society's annual review, besides a number of articles in the Society's *Journal.*

Moore's services to the Commonwealth and the Empire were recognized by being created C.M.G. in 1917 and a Knighthood in the Order of the British Empire in 1925. His academic attainments were recognized by St. Andrews and Melbourne Universities by the conferment of the Honorary Degree of LL.D. Following his retirement from the Professorship in Melbourne, he represented the Government of Australia in the League of Nations Assembly 1927–9, at the International Copyright Conference in 1928 and the Dominion Legislative Conference in 1929. His life was a remarkable instance of the triumph of mind over matter. He suffered throughout his life from poor health, but achieved, in spite of it, very conspicuous success.

A few days before Moore was taken to hospital on June 27, he wrote to express his thanks to the Executive Committee for his election as an honorary member of the Society. He recalled the "ante-natal" discussions with the founder of the Society, Sir Courtenay Ilbert, and his attendance at the inaugural meeting. His letter was followed by a contribution which "is really a sequel to an article contributed in 1925."[1] The article, which follows, is "a study on suits between governments in Canada and Australia, or rather a particular aspect of such suits, viz. the law which should be applied to them." He remarked that the subject has had "singularly little attention considering the very extended experience of such suits both in Canada and Australia," and then continued:

> I was led to devote special attention to it, first because of its importance in the federated Dominions and secondly because it seemed clear that an examination of the subject was necessary as a preliminary to any close consideration of the position in an "Empire tribunal": this became apparent during the 1929 Conference on Dominion Legislation, which took up the matter somewhat lightly, and found, as might have been expected, that we were all rather hazy as to how such a tribunal if constituted would set about its work. The conditions of such an Empire tribunal would, of course, be different from those of the High Court in Australia or the Supreme Court in Canada, but an examination of those tribunals was necessary in order that the differences should be appreciated.

Realizing that "the subheads which are a feature of the *Journal's* articles are particularly useful to the reader," Moore inserted these throughout the article. He concluded by observing that "the main title of the article has troubled me a little. One wants a title which when indexed will put searchers on to it—so much that is useful is apt to be buried by titles which do not explain themselves and require expert indexing. I have made 'Federations' the leading term in the title, as something to which a searcher of indexes would surely turn."

The Committee trust that such attention may be given to this contribution as to avoid any risk of its burial, but rather that it may be recognized as one of the works of permanent value by a great constitutional lawyer whose ability was devoted to finding a solution of Imperial problems so as to strengthen the bonds of Empire.

C. E. A. B.

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[1] *Journ. Comp. Leg.*, Third Series, vol. vii, pt. iv, pp. 155 *et seq.*

THE FEDERATIONS AND SUITS BETWEEN GOVERNMENTS.

[*Contributed by the late* SIR W. HARRISON MOORE, K.B.E., C.M.G.]

What Law Governs ?—In 1925, in an article contributed to this *Journal*,[1] the present writer began an examination of the subject of suits between Commonwealth and State and State and State in the Commonwealth of Australia. An allied subject, of course, is suits between Dominion and Province and Province and Province in Canada. That such suits are competent in the appropriate jurisdiction is beyond controversy ; and the exercise of such jurisdiction in both countries has now an extensive history. The apparent anomaly of suits in which an undivided and indivisible Crown is on both sides of the record has ceased from troubling, though the principle by which this jurisdiction is to be explained—separate juristic entities or different capacities of the Crown—is unsettled. If the law cannot live without the King, it cannot be gainsaid that it has difficulties in accommodating the various employments of the Crown. And where the Crown acts through different instruments, executive and legislative, and legislative instruments are independent of each other in whole or in part, we are brought to the question—what is the law itself ? What is the law to which the Supreme Court of Canada or the High Court of Australia turns in its original jurisdiction in controversies or matters between these high parties, and which the Privy Council applies where appeals in such cases are brought to it ? This is the question which was raised in my earlier article, and on which the present article offers some suggestions. In some cases, of course, it is obvious : both in the Canadian and Commonwealth Constitutions there are specific provisions which are meaningless except as creating rights and duties if there is a legal *persona* to which they can be attributed and a tribunal for defining and ascertaining their content whenever difference should make that necessary. In both cases provisions of this sort have been added to by later amendments of the Constitutions, notably in

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[1] Third Series, vol. vii, pt. ix, p. 155.

Canada in 1907 and 1930[1] and in Australia in 1928.[2] In such cases, the immediate appeal is to a law of acknowledged paramount authority, to which each is subject and which cannot be altered or varied by the legislative power of either: the only question is as to the interpretation and application of specific provisions of that law. But where the matter in dispute cannot thus be resolved by reference to the text of a written paramount rule, where is the relevant law to be sought, what is its source, the authority which maintains the obligation of its precepts, the will on which its continuance depends? We have a tribunal, bound to act upon "legal principles," and limited by such principles; is there a corresponding legislative power which can declare them, or are we, as in international law, faced with a law without a legislature? And, if there be no competent legislature or the competent legislature has not declared its will, what is the nature and character of the law to be applied? It has been insisted, not merely that the jurisdiction involves the application of "legal principles,"[3] but that the law must be one to which the parties are alike subject,[4] which indeed appears obvious, for the very notion of a judicial determination imports some standard other than the mere will of a party. Since Dominion and Province, Commonwealth and State are not merely right- and duty-bearing entities but law-making authorities whose will is embodied in the statutes they make, the law of any of them might appear to be excluded from the submission of their controversies to the determination of a judicial tribunal.[5] Yet this is not so; in many cases the law applied is the law of the Dominion or of the litigant Province, the Commonwealth or the litigant State,[6] and so far is it from being true that both are necessarily excluded that a passage—certainly of doubtful import—in a Privy Council judgment suggests that the choice is in all cases limited to the one or the other.[7] It is evident that the appeal to " legal principles " is ambiguous where there are various standards or systems of law which may be in competition. The only general answer that can be given beyond the obvious and ambiguous answer that the Court applies its own law is that no single and simple rule exists for uniform application in all manner of cases. In the comparable conditions in the United States, it has been said that " the submission by the Sovereigns or States to a court of law or equity of a controversy between them without prescribing any rule of decision, gives power to decide according to the appropriate law of the case ; which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission the question ceases to be a political one to be decided by the *sic volo sic jubeo* of political power ; it comes to the court to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question depending on the exercise of judicial power ; and it is bound to act by known and settled principles of national or municipal jurisprudence as the case requires."[1] In a later case, the Supreme Court of the United States declares: " Sitting as it were as an international as well as a domestic tribunal, we apply Federal law, State law and International law as the exigencies of the particular case may demand."[2] More recently still, in a suit for determining the proportions of the public debt to be borne respectively by a parent State and a new State formed out of it the Court pointed out that in such a quasi-international controversy there was no municipal code governing the matter, and that neither Congress nor either State alone could by its law dispose of the controversy. They added that such controversies must be considered in " an untechnical spirit."[3] While much may be learnt from the manner in which such matters have been dealt with in the tribunals of other federal states,[4] particularly in one whose legal notions and methods are derived from the same stock as our own, there are differences in the several constitutions demanding a discriminating recourse to them. This was remarked on by the High Court of Australia in *South Australia* v. *Victoria*.[5]

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[1] British North America Acts, 1907, 1930.

[2] Embodied in the Constitution as s. 105A. The Financial Agreement under this section was the subject of proceedings in the High Court in Australia in *Re The State of New South Wales, ex parte The Commonwealth*, (1932) 47 C.L.R. 58, and *State of New South Wales* v. *Commonwealth*, (1932) 46 C.L.R. 155, 235, 246.

[3] *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637, 645; *South Australia* v. *Victoria*, (1911) 12 C.L.R. 667.

[4] *South Australia* v. *Victoria*, *ibid.* at p. 715; *Commonwealth* v. *New South Wales*, (1913) 32 C.L.R. 200, 206.

[5] "From the time of such submission the question ceases to be a political one to be decided by the *sic volo sic jubeo* of political power": *Rhode Island* v. *Massachusetts*, (1838) 12 Peters at p. 737.

[6] Cf. *A.-G. for Manitoba* v. *A.-G. for Canada*, (1903) 34 S.C.R. 287, [1904] A.C. 799; *A.-G. for Canada* v. *A.-G. for Quebec*, (1929) S.C.R. 557, [1932] A.C. 514.

[7] *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637, 645.

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[1] *Rhode Island* v. *Massachusetts*, (1838) 12 Peters at p. 737.

[2] *Kansas* v. *Colorado*, (1901) 185 U.S. 146. See also (1906) 206 U.S. 46 at p. 97.

[3] *Virginia* v. *West Virginia*, 220 U.S. 1. *In re Southern Rhodesia*, [1919] A.C. 211, 244.

[4] For disputes between cantons in Switzerland, see *American Journal of International Law*, vol. iii, p. 88 (Max Huber), and vol. xv, p. 152 (Schindler).

[5] (1911) 12 C.L.R. 667.

The federal tribunal exercising jurisdiction between governments is in a peculiar position, distinguishing it at once from an international tribunal and from a domestic forum. It is not—at any rate in the United States, in Canada and in Australia—a tribunal exclusively concerned with "international disputes"; its jurisdiction embraces suits between governments, between governments and individuals, and between individuals. Suits between governments may as to subject-matter be identical with those which may arise between individuals; the difference may lie merely in the parties, as where there is a collision between government-owned vessels in State waters.[1] Or they may concern the respective powers of the governments under the distribution of authority in the common constitution. Or again, they may be "quasi-international" or "really international questions,"[2] such as boundary disputes, and many others. To quite a considerable extent, these questions may arise in suits between governments and individuals, or even in suits between individuals, as is evidenced by the frequent contests on the *locus standi* of a government as party, and by the numerous cases in which, in private litigation, either or both of the governments whose right or power is concerned are admitted as interveners.

International and Municipal Law and Courts.—In the ordinary functions of an international or a municipal court, not complicated by any federal relation, neither tribunal has difficulty in recognizing two distinct standards of legal judgment, each with its own separate authority; the standard which is conclusive in the one court may be irrelevant in the other.[3] If the municipal court recognizes or gives effect to international law, it does so merely so far as its own law allows, and it recognizes a category of matters "governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right nor the power of enforcing any decision which they may make."[4] In an international court, the State is an undivided entity with full unified power; the limitations and distribution of powers in its government are mere matters of internal management. The system of the court is international law, and it is that law which determines whether and to what extent a particular system of municipal law may be relevant in the circumstances of the case. If the court holds that the matter is one which by international law belongs exclusively to the domestic jurisdiction of a State,[1] that will commonly end the proceedings ; rights claimed under the domestic law must be sought in the domestic forum. More rarely, the court may have to ascertain and apply the municipal law itself ; it does so because international law has the function of doing justice between the parties, and this can no more be fulfilled in certain cases without recourse to municipal law than in a municipal court justice can be done without regard to some foreign municipal system or to international law.

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[1] Cf. *Commonwealth* v. *New South Wales*, (1923) 32 C.L.R. 200.

[2] Cf. *A.-G. for Dominion* v. *A.-G. for Ontario*, [1897] A.C. 199, 213.

[3] Cf. *Great Britain* v. *Costa Rica*, Ann. Digest Int. Law, 1923–4. Case No. 96.

[4] *Secretary of State for India in Council* v. *Kamachee Boye Sahaba*, (1859) 13 Moo. P.C. 22 at p. 75.

The Federal Situation.—In a federal system the situation of the federal and state governments *inter se* is essentially different from that of independent States in the international community, for the two governments exercise authority over the same territory and people according to the constitutional distribution of authority between them as against the exclusive and independent relation of foreign States. The governments are not foreign governments *inter se*[2] even in the qualified sense in which governments of the Crown ruling separate territories are foreign. There are not two systems of law—international and municipal—operating in different planes ; the legal relations arising have to be accommodated and reconciled within a single system of law, unrelieved or uncomplicated in the common court even by such diversities as, for example, were tolerated in the exercise of the several jurisdictions which have existed side by side in English courts, *e.g.* in the common law courts and the Admiralty, or the instance jurisdiction of the Admiralty and the Court of Prize. In particular, the legal relations both of governments and of individuals do not exclude but demand the consideration of constitutional powers and limitations, and these not merely the constitutional relations of Commonwealth and State Governments—the distribution of powers between their legislatures —but the attributes and powers of the component parts within the Commonwealth Government and the State Government respectively. Thus, the legal character of an act of the Executive Government is not concluded by such considerations as belong to " acts of state." [3]

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[1] Cf. The Serbian Loans Case, *B.Y.B. Int. Law* (1930), p. 200 *seq.*, P.C.I.J. Series A, Nos. 20–1 ; and the Case of the Norwegian Ships, *B.Y.B. Int. Law* (1923–4), pp. 159–61. Cases presenting questions for the application of municipal law increase with the practice of States presenting the claims of their nationals.

[2] Cf. *Commonwealth* v. *N.S.W.*, (1923) 32 C.L.R. 200, 209.

[3] Cf. *Dobree* v. *Napier*, (1836) 2 Bing. N.C. 781 ; *Carr* v. *Fracis Times & Coy.*, [1902] A.C. 176. See, for proceedings in a State court, *Potter* v. *Broken Hill Proprietary Coy.*, (1906) 3 C.L.R. 479, where the analogy of " act of state " was invoked by the High Court, on appeal from the Supreme Court of Victoria, in dismissing an

If either Commonwealth or State, Dominion or Province challenges the legality of some conduct of the other, the question will be not merely was there power under the Constitution to do the acts complained of, but did, *e.g.*, the statute enacted by the Commonwealth Parliament, under which the Commonwealth Executive is claiming to do the act, according to its true interpretation authorize it ; a question of Commonwealth law.

In the relation of the States or Provinces *inter se* an essential point of difference from their relations with the federal government is, of course, the fact that territorially they are mutually exclusive : the government of the one has no authority in the territory of the other, the "conflicts" of their laws are those which belong to private international law. But the analogy to separate States must not be pressed too far. The questions with which we are concerned are those that present themselves in a tribunal which is not the exclusive domestic *forum* of either of them, but a common *forum*. The completeness of the analogy to States or "law districts" in private international law breaks down in a vital particular : the paramountcy of the law of the *forum*. If that law asserts itself with sufficient clearness, the application of that law in cases where there is no principle requiring reference to some other law, the doctrine that upon final analysis it is always the law of the *forum* which is enforced and that any other law is invoked not *proprio vigore*, but merely by way of recognition—all these enure to establish in any given case not the law of the *forum* of this or that State or Province but the law of a *forum* which is equally the *forum* of all. To this technical but fundamental difference from the conditions of private international law, other differences from the conditions of public international law may be added. Within the federation, the Provinces or States form part of a single constitutional system in which their governments do not exercise complete political power but share that power with an authority which is common to all of them. In Canada and Australia, the basic matters of territorial limits and the nationality of subjects as well as foreign affairs are outside the control of their governments. They are as political units subject to the Constitution—the British North America Act and the Commonwealth Constitution respectively ; they have mutual rights and

action in Victoria for alleged breach in New South Wales of a patent for invention granted in New South Wales, the Court considering that as the action put in issue the validity of the patent, it fell within the general principle that the court of one country would not consider the validity or the legality of the act of the government of another country done within its territory.

obligations under these Constitutions, and their governmental authority is subject not merely to restraints, but to restraints imposed on each of them in the interests of the rest. As organized political communities they are not self determining, deriving their existence from some act of State that imputes to them the attributes of sovereignty, wherever in their constitutions the several powers of government may be lodged. They have been established by superior legislative authority which defines their powers affirmatively and negatively. Thus their relations with each other may present themselves neither in the fullness of the powers of independent States, nor in the restraints imposed by international law on such States, but as constitutional questions arising from the prescriptions of a paramount constitutional law. The Crown is a part of the government of each, and their people have a common allegiance to the Crown. Amid all the fissiparous tendencies of constitutional development, the unity and indivisibility of the Crown are insisted upon as legal doctrine. In fine, Provinces and States are integral parts of a system which aims at and depends upon the maintenance of an orderly and constitutional government among the people and the territory constituting the federation, and which negatives among them not merely war and the laws of war, but all which flows from that postulate.

Jurisdiction of Federal Tribunal in Canada and Australia.—There are differences in the source of jurisdiction between the Supreme Court of Canada and the High Court of Australia, and there are differences in their respective constitutions which may have a bearing both on jurisdiction and law. The jurisdiction of the High Court of Australia springs from the Constitution itself and cannot be abridged by any action of the legislature, Commonwealth or State, and this extends to whatever implications may attach to jurisdiction. In Canada there are concurrent legislative acts of Dominion and Provinces whereby the Crown in right of each is submitted to the jurisdiction of the Supreme Court, and while the Crown in any such right cannot claim immunity from proceedings while the act of its own legislature remains in force, the repeal of the act would be a valid withdrawal from submission to the court.[1]

The grant of jurisdiction is not limited or qualified by any prescription of classes of matter or controversy ; but it is of its nature limited to such disputes as can be determined by some recognized principle of law:[1]—in other words, the court will not assume the *arbitrium boni viri*. In Australia, it has been held that the general grant no more excludes from jurisdiction the category of tort than it excludes titles to property or contractual claims;[2] it not merely gives competence to a court which, not being one of general jurisdiction, would otherwise not be competent, even in case of voluntary submission; it confers compulsory jurisdiction over an unwilling defendant.[3] In Canada, the fact that jurisdiction over Dominion or Province arises from its own legislation, may have as a consequence that conditions or restrictions may be attached not merely as to the kind of controversies cognizable, but also as to the law to be applied, and that another government, in suing, has to take the submission as it finds it: that where the exemption of a government from jurisdiction is absolute except so far as its own law provides, there is no limit to the power of the legislature to prescribe the rules that may be applied to its government. That is a question which may have to be decided some day in Canada. But it would seem that while the Dominion or Province gave and might withdraw jurisdiction by its legislative act, it could not in the guise of terms and conditions of jurisdiction require the court to give effect to rules upon matters which under the British North America Act were not within the competence of the enacting legislature. The general power of legislation conferred on the Dominion Parliament by the opening words of s. 91 of the British North America Act has not been deemed to enable that legislature to confer compulsory jurisdiction over the Provinces, nor would it seem to authorize generally the prescription of the laws to be applied by the Supreme Court to the controversies.

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[1] In *Province of Ontario v. Dominion of Canada*, (1909) 42 S.C.R. 1 there are observations on the position in the absence of legislation—Duff J., p. 19, cf. S.C. 39 S.C.R. 14, 44 (Idington J.).

In Australia, the constitutional basis of jurisdiction involves some implication of rights of parties beyond legislative interference. The provision of s. 78 of the Commonwealth Constitution, whereby the Commonwealth Parliament may make laws conferring rights to proceed against Commonwealth or State in respect of matters within the judicial power, was in any case obscure, and has been held to be superfluous so far as concerns jurisdiction or matter of jurisdiction over Commonwealth and State.[4]

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[1] *South Australia* v. *Victoria*, (1911) 12 C.L.R. 667, 675; *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637, 645.

[2] *South Australia* v. *Victoria*, (1911) 12 C.L.R. 667, [1914] A.C. 283; *Commonwealth* v. *New South Wales*, (1923), 32 C.L.R. 200.

[3] *Ibid.*

[4] *Commonwealth* v. *New South Wales*, (1923) 32 C.L.R. 200.

There are difficulties in the case of *Commonwealth* v. *New South Wales*,[1] some of which are considered in relation to tort in the evidence of Mr. Owen Dixon (now Dixon J.) before the Commonwealth Constitution Commission, 1927–9, p. 785, and the difficulties are not limited to that category. But while the High Court in that case—an ordinary claim of damage arising from a collision in Sydney Harbour between ships owned by the respective governments—probably considered that the State was liable to the Commonwealth in tort wherever there would be a cause of action between subject and subject, that it was immaterial whether the State law provided for the liability of the State Government in tort or not; that the Commonwealth was in like circumstances liable to a State, and that no Commonwealth legislation could impair that liability, in fact no question of substantive liability was raised since the case was before the Court on a motion to set aside the writ for want of jurisdiction, and in fact the law of New South Wales did provide generally for the liability of the State Government in tort.

The Law of one or other of the Governments: Analogy to Private Suits.—One of the apparent anomalies of the jurisdiction exercised between these political entities is that it is more clear that many of the matters between them must be decided by the law of the one or the other, than that there are controversies that must be referred to some standard outside the legislative control of either. It suggests the substitution of "will" for "law," and appears to run counter to the postulate that jurisdiction "includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations and constitutes the measure of their respective rights and duties."[2] The anomaly, however, disappears on consideration. If the Crown in right of New South Wales is sued by the Crown in right of the Commonwealth or in right of Victoria the application of the law of New South Wales to the cause is not the application of the mere will of the defendant, for the defendant Crown cannot authoritatively declare the law or make law save by independent action in Parliament or under Parliamentary authority; in the character in which it is before the court it is bound by the law. No one supposes that where the Crown is sued by a subject there is a negation of law, though the law can be altered by the Crown in Parliament. It will be convenient to consider first for what reason cases may fall under the law of the one or the other government.

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[1] (1923) 32 C.L.R. 200.

[2] *South Australia* v. *Victoria*, (1911) 12 C.L.R. 667, 715, per Isaacs J. Cf. *New South Wales* v. *Commonwealth*, (1926) 38 C.L.R. 74, 108 Isaacs J.

As Governing Law.—The insistence in some courts upon the type or model of suits and rights between "individual persons" or "subject and subject"[1] may be imprecise or inadequate as an expression of the full extent of jurisdiction or of the rights cognizable, but it calls attention to the fact that in a great part of the matters or controversies in the federal tribunal between these parties, there is no need to seek any other law than that which would determine the mutual rights of private litigants in that court. The court has to determine (having regard to the nature of the right litigated and the circumstances of the case) which of possible competing municipal laws is the law applicable to the case. It must be remembered, of course, that the law will include any Commonwealth legislation upon any relevant matter which, under the constitutional distribution of power, forms part of the law in a State, *e.g.* so far as the matter litigated relates to a cheque or a bill of exchange, recourse must be had to the Commonwealth law as superseding in each of the States any other law upon that subject.

In Switzerland, in "disputes in civil law" (as distinguished from "disputes in public law") between cantons, the law applicable is that "private law, federal or cantonal, which in analogous cases between private parties would be applied according to principles of private international law."[2] Where the United States sued the State of North Carolina as holder of bonds of the defendant State, the Supreme Court held that the relation was governed by the law of the State—"the case falls within the general principle well established in this court that contracts are to be governed as to their nature, their validity and their interpretation by the law of the place where they are made unless the contracting parties appear to have had some other place in view."[3] If the Government of Queensland leases a warehouse in Tasmania from the Government of Tasmania, the respective rights and duties under the lease will be governed by the law of Tasmania. If the Commonwealth of Australia or the State of Victoria disposes of surplus stores in New South Wales to the Government of New South Wales, the law of the latter State will determine the transfer of property in the *res*. If the Commonwealth claims to take advantage of a State statute requiring public officers to register a certificate of transfer of land, it may do so, but according to the conditions imposed by the State law.[1] Either Government may have a title to right against the other in the present law of the other, *e.g.* on a statutory transfer of property or rights in property[2] or upon a statute confirming an agreement between the governments. But the submission of a relation to any law includes that law as established from time to time by its legislature; the law is liable to repeal or alteration and therefore the rights sustained by it are liable to extinction or variation, except so far as some paramount law may intervene.[3] The position is not altered by the fact that the claimant or the defendant or both of them are governments. Constitutional questions, however, may arise at, at any rate, two points. The Constitution may by paramount provision have removed certain claims in whole or in part from the operation of particular laws. The effect of the grant of jurisdiction by s. 75 of the Commonwealth Constitution is raised by the High Court judgment in *Commonwealth* v. *New South Wales*[4] in the case of a State, whether it is liable to the Commonwealth or another State in all the common causes of action recognized under its law in the case of subject and subject even though the State law does not recognize some of them as causes of action against the State itself, *e.g.* whether the Crown in right of Victoria—whose law does not provide for the liability of the Crown in tort—would have been liable to the Commonwealth in circumstances similar to those in *Commonwealth* v. *New South Wales*, if Victorian waters were substituted for New South Wales; in the case of the Commonwealth, whether it is liable to a State just as one private individual is liable to another, without power to define the categories of liability, *e.g.* exclusion of tort, or the principles of liability.[5] The other constitutional factor is that in the relations of governments as in the relations of a government and an individual, the competence of ministers or officers who have affected to act on behalf or in the name of the Crown in right of that government, to impose upon it obligations or liabilities appears to involve recourse to the law of that government itself, as its personal law.[1] This is probably a principle both of international and private international law. But whether it is or is not, it cannot be ignored in a court which like the High Court of Australia or the Supreme Court of Canada is in relation to the governments neither an international nor a foreign tribunal.

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[1] *E.g.* The High Court of Australia in *South Australia* v. *Victoria*, (1911) 12 C.L.R. 667, 675, 715; *Commonwealth* v. *New South Wales*, (1923) 32 C.L.R. 200, 207.

[2] Cf., *Am. Jnl. Int. Law*, vol. iii, at pp. 88–9 (Max Huber).

[3] (1889) 136 U.S. 211.

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[1] *R.* v. *Registrar of Titles*, (1915) 20 C.L.R. 379; *Commonwealth* v. *New South Wales*, (1918) 20 C.L.R. 325; *ibid.* (1923) 33 C.L.R. 1.

[2] *A.-G. for Manitoba* v. *A.-G. for Canada*, (1903) 34 S.C.R. 287, [1904] A.C. 799.

[3] Cf. *McGregor* v. *Esquimault & Nanaimo Rly.*, [1907] A.C. 462, and *Royal Bank of Canada* v. *Rex*, [1913] A.C. 283, 296. See also *A.-G. for New South Wales* v. *Trethowan*, (1931) 44 C.L.R. 394, [1932] A.C. 536 and *Ellen Street Estates, Ltd.* v. *Minister of Health*, [1934] 1 K.B. 590.

[4] (1923) 32 C.L.R. 200.

[5] In Canada, jurisdiction has been conferred by Dominion legislation on the Exchequer Court in certain claims of tort against the Dominion. As the liability itself arises under Dominion law, that law could no doubt fix its extent and the principles and rules to be applied in determining it. Actually, the liability has been deemed to be imposed according to the general provisions (*e.g.* in relation to the application of the doctrine of common employment, contribution of joint tort feasors,

Constitutional Questions.—In a matter or controversy between governments not merely may one be claiming rights or privileges under the law of the other, it may be asserting a title under its own law. Within its sphere of power, a legislature may create rights in its own government, and if these are rights availing against persons generally, they may avail against the other government. There may be competition between the two governments, each claiming the same substance by a title based on its own legislation. Such a case is *A.-G. for Canada* v. *A.-G. for Quebec.*[2] There, on the administration of an insolvent estate where the assets were insufficient to satisfy the claims of both Dominion and Provincial Governments as creditors, each of them claimed priority as for a Crown debt under its own legislation. The Province, admitting the validity of the Dominion legislation, claimed to rank *pari passu* in virtue of the equal validity of its own; the Dominion contended that the Provincial legislation was *ultra vires*, or if valid was subject to a paramountcy of rights created by the Dominion legislation. The right depends on the existence of an appropriate power and its valid exercise; it depends therefore upon the Constitution. The power of the one legislature to impose duties, obligations or liabilities upon the other government, or to detract from its rights either as a *persona designata* or *inter alios*, is a constitutional matter of the greatest intricacy, upon which generalization is dangerous.[3] In Canada it is held that neither

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contributory negligence, etc.) in force at the time of such imposition in the Province where the tort was committed. (*Rochon* v. *The King*, (1932) Exch. Court 161. Cf. *The King* v. *Armstrong*, (1908) 40 S.C.R. 229; *The King* v. *Desrosiers*, (1908) 41 S.C.R. 75.) The principles have been affirmed in private suits against the Dominion; they would seem to be equally applicable in similar suits by a Province.

[1] This matter was approached in *New South Wales* v. *Bardolph*, (1935) Argus L. R. 22, in the judgment of Evatt J. (not yet reported in C.L.R.)

[2] (1929) S.C.R. 557, [1932] A.C. 514. The Privy Council decided the constitutional issues in favour of the Dominion, but found in favour of the Province in the interpretation of the Dominion statute. Cf. *In re Silver*, [1932] A.C. 514.

[3] Cf. *John Deere Plow Co.* v. *Wharton*, [1915] A.C. 330, 338.

Dominion nor Province can impose financial obligations or liabilities on the other[1] and that where property is attributed under the Constitution to the Crown in right of the Dominion or of a Province, the other legislature cannot in the exercise of its general powers of legislation confer upon its own government or upon private persons rights in the nature of property in the *res*.[2] But the property of either is not otherwise exempt from the operation of the legislation of the other, and the American doctrine of the " immunity of the instrumentalities " of each from the laws of the other is decisively rejected.[3] In Australia, the Constitution expressly exempts the property of each from taxation by the other (s. 114). After many difficulties in the assimilation of the American doctrine of the immunity of instrumentalities, the High Court in 1920[4] adhered to the view expressed by the Privy Council in 1907[5] that the doctrine was not applicable in Australia. That the decision has not removed all difficulties and doubts is shown in *Pirrie* v. *Macfarlane* ;[6] and in *Australian Railways Union* v. *Railway Commissioner for Victoria*.[7] Judgments in the latter case suggest a qualification of general import viz. that even where Commonwealth legislation may impose a financial obligation upon the State, the provision of funds to meet it is a constitutional function of the State Parliament in respect of which the latter is subject to no control. That in turn is subject to the qualification that the Constitution of the Commonwealth must be examined in any particular instance to see whether the obligation has been made independent of this function of the State Parliament, as was found in s. 105A of the Commonwealth Constitution in relation to the Financial Agreement between the Commonwealth and States.[8]

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[1] *Province of Ontario* v. *Dominion of Canada*, (1908) 42 S.C.R. 1, 130 (Duff J.), [1910] A.C. 637.

[2] Cf. *A.-G. for Dominion* v. *A.-G. for Provinces*, [1898] A.C. 700; *Burrard Power Coy.* v. *Rex*, [1910] A.C. 87; *A.-G. for British Columbia* v. *A.-G. for Canada*, [1914] A.C. 153. The cases are reviewed in Reference *re Waters and Water Powers*, (1929) S.C.R. (Canada) 200. " The effect of the decisions seems to be that neither the Dominion nor a Province can take possession of a source of revenue which has been assigned to the other, and as a source of revenue appropriate it to itself nor as owner transfer it to another "—per Duff J. at p. 212.

[3] *Bank of Toronto* v. *Lambe*, 12 A.C. 575. Cf. also *John Deere Plow Coy.* v. *Wharton*, [1915] A.C. 330, 342–3; *Great West Saddlery Coy.* v. *The King*, [1921] 2 A.C. 91; *Caron* v. *The King*, [1924] A.C. 999; *A.-G. for Quebec* v. *Nipissing Central Rly. Co.*; *and* A.-C. *for Canada*, [1926] A.C. 715; *A.-G. for Manitoba* v. *A.-G. for Canada*, [1929] A.C. 260; *Lymburn* v. *Mayland*, [1932] A.C. 318.

[4] *Amalgamated Society of Engineers* v. *Adelaide S.S. Coy.*, (1920) 28 C.L.R. 129.

[5] *Webb* v. *Outtrim*, [1907] A.C. 81.

[6] (1925) 36 C.L.R. 170.

[7] (1930) 44 C.L.R. 319.

[8] *State of New South Wales* v. *Commonwealth*, (1932) 46 C.L.R. 155, 235, 246.

Provincial or State Law as Part of the "Facts."—In an important class of matter the law of a Province or a State may be part of the essential "facts" of the *case.* A common matter or controversy between federal and state or provincial governments is in respect of "prerogatival" rights, rights distinctive or characteristic of governments, and therefore not part of such rights as exist between individuals except so far as such individuals may be grantees of the government. Such cases are claims of mines royal,[1] fisheries[2] escheats and *bona vacantia.*[3] The root of title is commonly an alleged right of the Crown as head of a unitary Government, and the main question will be how far the Constitution itself or acts done under the authority of the Constitution dispose of the right between the two governments—whether it is left with the one or transferred to the other, either *in se* or as part of other property transferred, and whether as property or right in the one government it is subject at all or to what extent to the legislative power of the other. But a preliminary matter, of course, is the existence of the alleged Crown right itself. Whether, in the case of mines royal in the territory which is now Alberta, or in the case of fisheries in the waters of British Columbia or Quebec, there was a right of the Crown prior to the establishment of the Union or the creation or admission of the Province was a matter to be ascertained under the law at that time in existence in the Province. So in *A.-G. for British Columbia* v. *A.-G. for Canada,*[4] you find an elaborate discussion of the English law on the subject of Crown and public rights of navigation and fishing, because the law of England had been introduced into British Columbia and not been altered by Columbian legislation. In *A.-G. for Canada* v. *A.-G. for Quebec*[5] the situation was different, for the Province was not a common law but a civil law area. The Dominion Parliament has exclusive power to make laws with respect to sea-coast and inland fisheries; but it has no power to dispose of any proprietary rights of a Province, *i.e.* to assume a proprietary right of its own. The question whether fisheries in tidal waters were at the time of federation a proprietary right of the Crown in the Province of Quebec depended on the law of that Province. The Province claimed that under the French law they were a proprietary right of the French Crown and not a public right as under the common law. It was, however, shown that before federation the law of Quebec in this matter had by legislation been assimilated to the common law; that therefore the Crown could not as grantor confer any rights of fishing in such waters. The matter of mines royal and the question whether they passed on a transfer of land or property from the provincial or state government to the federal government has given rise to cases in Canada and Australia with a difference of result if not of judicial opinion.[1] It was an agreed starting-point in both cases that what was disposed of was the right or property of the Crown; it was not in analogy to judgments *in rem* a disposition of all right irrespective of the person to whom they belonged or in analogy to an international cession of territory, a cession of *imperium* as well as *dominium*. It was also an agreed starting-point that what were the rights of the Crown must in the first instance be ascertained by reference to the law of the Province or State, and in both cases that law was the law of England. It followed that the mines royal in the lands disposed of were the property of the Crown in right of the Province at the time of the disposition. In the Canadian case, the disposition was of public lands of the Province by the Order in Council admitting British Columbia to the Dominion of Canada and embodying *inter alia* a railways construction agreement of which this transfer of public lands by the Province was a term. The Privy Council held that in these circumstances it was necessary to consider the legal nature of the rights of the Crown in public lands and in mines royal, and holding that these were separate and under distinct titles, considered that the agreement dealt with "public lands in so far as these were available for ordinary purposes of settlement" and must be subject to ordinary rules of construction applicable to grants and so exclude mines royal. They rejected the view which had been adopted in the Supreme Court of Canada,[2] that the provision being contained in the Articles of Union must be dealt with on the footing of "an independent treaty," which no doubt would pass all rights of the one to the other irrespective of the separation of the rights or the titles under which the transferring government held its several rights in the land. In the Australian case, the claim of the Commonwealth arose under nothing of a more public or "international" nature than the exercise of a power under s. 51 (xxxi) of the Constitution whereby the Commonwealth may make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. The High Court of Australia (Higgins J. dissenting) held that whether or not the Crown in right of the State held public lands and mines royal under distinct titles, they were nevertheless in any given parcel rights in the nature of property in a single material thing, and that where the constitution and the legislation spoke of "property" without qualification, as a subject of acquisition by the Crown in right of the Commonwealth from the States, that included all rights of the States therein, and that no restrictive inference could be based on the purposes for which the Commonwealth might require or use the land.

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[1] *A.-G. for British Columbia* v. *A.-G. for Canada,* (1889) 14 A.C. 295; *Commonwealth* v. *New South Wales,* (1923) 33 C.L.R. 1.

[2] *A.-G. for Canada* v. *A.-G. for Provinces,* [1898] A.C. 700; *A.-G. for British Columbia* v. *A.-G. for Canada,* [1914] A.C. 152, 175; *A.-G. for Canada* v. *A.-G. for Quebec,* [1921] A.C. 413.

[3] *A.-G. for Ontario* v. *Mercer,* (1883) 8 A.C. 767; *A.-G. for Canada* v. *A.-G. for Alberta,* [1928] A.C. 475. Cf. *In re Barnett's Trusts,* [1902] 1 Ch. 847, where a comparable question of *bona vacantia* was litigated between the Crown and the Government of Austria.

[4] [1914] A.C. 152.

[5] [1921] A.C. 413.

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[1] *A.-G. for British Columbia* v. *A.-G. for Canada*, (1889) A.C. 295; *Commonwealth* v. *New South Wales*, (1923) 33 C.L.R. 1.

[2] (1886) 14 S.C.R. 345.

Disputes Outside the Analogy of Private International Law: a Paramount Law?—In the matters or controversies considered, the relation between the governments has a governing law in the same sense as have private relations and disputes: some municipal law, with its appropriate legislature, to which the relation is attributed on familiar principles, complicated no doubt by the federal distribution of powers. The conflict, if conflict there be, will be between the law of one State or Province and the law of another State or Province, or between the law enacted by the Commonwealth or the Dominion and the law enacted by a State or Province. It is, of course, conceivable though improbable that the circumstances of the cases might make some law foreign to both the "governing law" in whole or in part, *e.g.* in case of a collision between ships owned by Dominion and provincial governments respectively, if the collision took place in United States waters, the law of the United States or of a particular State in the United States would be a material factor in determining liability. Similarly, in a claim on salvage operations. Or again if the Commonwealth and a State or several States were by agreement purchasing material or marketing products in a foreign country.

But there are possible matters of claim between governments, from which all the ordinary *indicia* of private international law and its analogies for the ascertainment of a governing law are absent, cases in which it is clear that there is no submission by either government to the law of the other, facts in which the relation between the governments belongs not to supremacy and subjection but to independence and equality. In such case the choice appears to lie between some law outside the legislative will of either, and recourse to the law as declared by the defendant's legislature on the principle of the omnicompetence of that legislature and the finality of the declarations of its will. In the latter case the common court would accept jurisdiction, but must find that the plaintiff had no right whenever the defendant's legislature had said so. Such matters will be more common as between States or Provinces in a federal union than between the federal and the state or provincial governments. They are the cases which in Switzerland are " disputes in public law " between the cantons,[1] which in Germany[2] and the United States[3] lead the courts to advert to international law. But they are not excluded from the relations of federal and provincial or state governments, for, outside the constitutional provisions of supremacy and subordination, the governments are independent *inter se.*

The essentially governmental character of these relations does not mean that they fall outside the established categories of legal right—property, contract, quasi-contract, tort. They may even be " commercial transactions " in the sense that they deal with property, works, services, payment, contribution or indemnity. In fact, that a party setting up some matter of right must aver something falling within recognized categories appears to be the main significance of the pronouncements of the High Court of Australia that the rights claimed must be such as could exist between private individuals. On the other hand, a right so constituted is not out of court because governmental power depends upon it.

Boundary disputes between States or Provinces are perhaps the most obvious matters of right depending upon some standard of right other than the legislative will of either. They may be regarded in various aspects, and the court may be hesitant as to whether the immediate matter of adjudication is a complaint of trespass and claim of property, or the powers of the Crown to dispose of public lands, their profits and revenues, through one set of governmental organs or the other, or again whether the " matter " or " controversy " is the competing claims to political power in the full sense—legislative, executive and judicial—presented and defended by the Crown in its respective rights as the *persona* of each of the political communities. If in the case of *South Australia* v. *Victoria*[1] there are indications of different views on these subjects, at least there was a concurrence of opinion that neither was jurisdiction ousted nor right affected by the political consequences that would ensue upon the decision. But whatever the nature of the claim presented for adjudication in such cases, the title rests upon some paramount law—an Imperial Act or instrument thereunder. A further step in a state's boundary is the actual ascertainment and demarcation of the boundary on the ground. That belongs to the very nature of the establishment of a boundary, and is essential for the guidance of authorities and individuals. It is inherent in the authority which prescribes the boundaries ; in the absence of directions from the Crown to any persons to carry out the necessary surveys and fix the marks, these measures belong to the colonial authorities. Where they have been carried out by these authorities in conjunction, and the results adopted by them, the measures become effective and no act by either government can deprive them of their force.[2] No specific form of approval by the Crown in its Imperial capacity appears to be necessary ; it is not even apparent that any approval was necessary ; it would probably be enough that the measures were not disapproved or disallowed ; possibly, acquiescence of all parties over some undefined but substantial period would conclude the matter. A connected matter would be the respective powers and rights of each in boundary waters, a question that arose on the separation of Victoria and New South Wales by the Imperial Act of 1850, and was settled by an Act of 1855, making the bed of the River Murray part of the territory of New South Wales.

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[1] Cf. *American Journal of International Law,* vol. iii, p. 88, vol. xv, p. 152 ; *Ann. Dig. Int. Law,* 1927–8, Case No. 289.

[2] *Ann. Dig. Int. Law,* 1925–6, p. 352 ; 1927–8, Case No. 86.

[3] *Kansas* v. *Colorado,* 185 U.S. 146, 206 U.S. at p. 97 ; *Virginia* v. *West Virginia,* 220 U.S. 1.

The Question of an Inter-Government Law : Agreements between Governments.—The case of agreements between governments brings out most sharply the issue, more especially where as frequently happens the agreement is specifically embodied in or approved, confirmed or ratified by Acts of the Parliaments of the governments concerned.

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[1] (1911) 12 C.L.R. 667, [1914] A.C. 283.

[2] *South Australia* v. *Victoria*, (1911) 12 C.L.R. at pp. 700, 703, 706, per Griffith C.J. ; [1914] A.C. 283, 309–310. It may be noted that the boundary marked by the surveyors having been "notified and proclaimed" by the Governor of South Australia in 1847 and by the Governor of New South Wales in 1849 (Victoria was until 1851 part of New South Wales), the Governor of South Australia in 1894 issued a proclamation purporting to revoke the proclamation of 1847—see 12 C.L.R. at p. 698.

Two classes may be put aside—those private contracts which upon ordinary principles can be referred to the law of the one or the other as the governing law, and those agreements which are protected by specific provision or necessary implication from such provision in the Constitution.[1]

The fact that in some cases agreements between governments have been embodied in constitutional amendments, as by the British North America Acts, 1907 and 1930, or have been specially provided for in a constitutional amendment, as is the case of agreements between Commonwealth and States regarding the public debts of the States in s. 105A of the Commonwealth Constitution, may no doubt suggest that without such constitutional provision agreements were not protected against repudiation by unilateral legislative action. But there are so many reasons for putting particular agreements into the Constitution that these instances have little bearing upon the general subject of the legal status of agreements. Illustrations of the matters now to be considered may be found in agreements between governments for maintaining or restoring the common boundary marks and apportioning the cost; the agreement between New South Wales, Victoria and South Australia embodying a scheme of works and management for the utilization of the waters of the River Murray; agreements between Commonwealth and State for co-operation in various administrative services, such as the collection of revenue, the preparation of electoral rolls, the execution of works, etc.; agreements to refer to arbitration any dispute as to the respective claims and liabilities under any of these co-operative enterprises and an award of arbitrators thereunder. Parenthetically, it may be observed that, contrary to what might be supposed, agreements of governments loom large in a federal system. Superficially, it might appear that co-operation by agreement was obviated in the distribution of powers: that what is of common concern requiring common effort or action is determined in the assignment of matters to the national or federal government, and that consequently there is less rather than more need for co-operation by consent under a federal government than is found in the normal relations of states *inter se*. But in fact—whether from an original inadequate assignment of power to the central authority, or the lag of constitutional revision, or the emergence of unforeseen conditions

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[1] Cf. *A.-G. for Ontario* v. *A.-G. for Canada*, (1907) S.C.R. at pp. 27–8; *Burrard Power Coy.* v. *Rex*, [1911] A.C. 87, 94; Reference *re Waters and Water Powers*, (1929) S.C.R. 200, 216.

—the active operation of two governments each concerned with the welfare of the same people will make some mutual understanding and forbearance, and some measure of co-operation, matter of sound policy, or even of necessity if policy is to be effective.[1] This is equally true of the relations of States or Provinces as of federal and state or provincial governments. In Australia the agreements are numerous and of vast scope, detailed and complicated. Their execution in many cases is possible only by some preliminary or concurrent exercise of governmental power, as in railway construction, or the acquisition of the whole stock of some product, or some control over imports or exports. They are entered into in the most formal manner with the intention of establishing legal relations between the governments to the fullest extent that these are possible, and not merely such political relations as were found in some of the war arrangements.[2] They are approved or confirmed by the Parliaments of the governments concerned and are set out in statutes or scheduled to them. No doubt in one way or another the statutory recognition or approval could or would give to the terms and conditions of the agreement the character of statutory rights and obligations under the law of each government.[3] Each of the governments could maintain an action in the Supreme Court of Canada or the High Court of Australia, as the case might be, in respect of the rights created in its favour by the legislature of the other. But of course if its title to right has nothing else to support it than the law of that other, the alteration of that law may extinguish the right, and annul the obligations imposed and all liabilities incurred in the performance or non-performance of the agreement.

The Conflicting Principles.—It may be useful to summarize the arguments which, it is conceived, may be brought, on the one hand, to establish the complete control of each of the legislatures over the obligation of such contracts, and, on the other hand, to support the view that the contract, once made, creates obligations which are unalterable by unilateral legislative act.

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[1] Cf. Clement, *Canadian Constitution*, pp. 394–7. See also *A.-G. for Canada* v. *A.-G. for Quebec*, [1921] 1 A.C. 413, 427.

[2] Cf. *John Cooke & Coy., Proprietary Ltd.* v. *The Commonwealth, etc.*, (1921–2) 31 C.L.R. 394, 416, 418, 34 C.L.R. 269 (P.C.); *Commissioner of Taxes* v. *B.A.W.R. Association*, [1931] A.C. 224, 235. Contrast *Welden* v. *Smith*, (1922) 30 C.L.R. 585, [1924] A.C. 484.

[3] For statutory contracts see *Manchester Ship Canal Coy.* v. *Manchester Racecourse Coy.*, [1900] 2 Ch. 252, [1901] 2 Ch. 37, and cases cited by Farwell J.; Reference *re Refund of Dues*, (1933) S.C.R. (Canada) 616, 628. Cf. also *Wedding* v. *Meyler*, (1903) 192 U.S. 573, 582–3, per Holmes J.: "It is hardly necessary to be curious or technical when dealing with law-making power in inquiring precisely what legal conceptions shall be invoked in order to bring to pass what the legislature enacts. If the legislature says that a matter within its competence shall be so, so it will be, so far as legal theory is concerned, without regard to the *elegantia juris*, or whether it fits that theory or not."

Unilateral Control?—The power of the legislature over such agreements is affirmed upon general constitutional principles. No public authority can by any arrangement or agreement regarding the exercise of its powers fetter the future exercise of those powers;[1] no Minister of the Crown can fetter the action of the legislature,[2] even when acting under the authority of the legislature and in the name of the Crown. The legislature has power to repeal its own acts, and what it has given or conferred by legislation it can take away by later legislation;[3] it cannot by any act bind itself not to exercise its power. These characteristics are inherent in legislative power, or are attributes of a colonial legislature whose powers are of the same nature as those of the Imperial Parliament itself.[4] It is not unknown for a contract of the Crown with some private person or body to be sanctioned or affirmed by special act of legislation, and no one doubts that the statute may be repealed and the agreement annulled; can the case be different when the agreement is with another government? The legislative sanction or its method in any case does not alter the essential fact that the contract is made by the Crown under the authority of the law, and under the control of the law: the Crown does not act in a mandatory capacity on behalf of the legislature so as to make the legislature the principal in the transaction.[5]

An agreement between the governments, sanctioned by legislation, that the legislature would not exercise some of its powers or would exercise them in a particular way (*e.g.* that the Commonwealth would withdraw from a particular field of taxation or that the States would so arrange their income-tax or death duties as to avoid double taxation) would, if anything more than an ordinary legislative Act, allow the policy of each to be controlled by the other, an abdication of power which would contradict the constitution under which the legislature held its powers. To admit that whenever two governments and legislatures are in accord and sympathy in policy they may protect their measures against the hazard of a change of political forces in the country and the reversal of their policy, by the device of embodying them in an agreement and thus making them unalterable by either save with the assent of the other government and legislature in which they have no part or share, assails the principle of representative government itself, which is rooted in the freedom of a political community to change its mind. A court cannot of course consider motives or magnitudes, or the circumstances which might be deemed to make a change of policy desirable ; and there is no principle of distinction between classes of case.

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[1] *Rederiaktiebolaget Amphitrite* v. *The King*, [1921] 3 K.B. 500. (But see the criticism of Sir William Holdsworth in L.Q.R. vol. xlv, 166.) *Watson's Bay South Shore Ferry Coy.* v. *Whitfield*, (1919) 27 C.L.R. 268, 277.

[2] *New South Wales* v. *Commonwealth*, (1926) 38 C.L.R. 74, *Commonwealth* v. *New South Wales*, [1929] A.C. 431, 441; *North Charterland Exploration Coy.* v. *The King*, [1931] 1 Ch. 169, 187.

[3] Cf. *McGregor* v. *Esquimault & Nanaimo Rly.*, [1907] A.C. 462, and *Royal Bank of Canada* v. *Rex*, [1913] A.C. 283; *Ellen Street Estates Ltd.* v. *Minister of Health*, [1934] 1 K.B. 590.

[4] Cf. *R.* v. *Burah*, (1878) 3 A.C. 889; *Webb* v. *Outrim*, [1907] A.C. 81, 88; *Croft* v. *Dunphy*, [1933] A.C. 156, 163.

[5] Cf. *Commonwealth* v. *Colonial Ammunition Coy. Ltd.*, (1923–4) 34 C.L.R. 198, 221–2, Isaacs and Rich JJ.

A Paramount Law Binding *inter se*?—On the other hand, as has been recently pointed out,[1] the power of the legislature by repeal of its laws to undo what has been done, is itself a matter for examination. In the case of a sovereign body, the latest expression of its will is the unchallengeable expression of the law. Colonial legislatures, in whatever other respect comparable with the Imperial Parliament, are not sovereign and are subject to law. Their powers are limited territorially, and their acts are liable to be over-ridden by paramount legislation, and these limitations are enforced in their own courts. The question whether they can undo what they have done depends not on anything so abstract as the nature of legislative power or the attributes of the Imperial Parliament, but on whether there is some law applicable to them which prevents it. That rights created by a legislature may have passed beyond the control of that legislature and so be unaffected by repeal or alteration of its law, is recognized by the Privy Council in *Royal Bank of Canada* v. *Rex.*[2] In that case the rights concerned had in the events that happened ceased to be property or civil rights in the Province and attempts to affect them by the legislature were unconstitutional and therefore ineffective even in the courts of the Province itself. But even if in its own court the acts of the legislature were effectual to discharge or annul an agreement, they would not be effectual in any other court unless that law was upon accepted principles the governing law. That rule would, *semble*, apply not merely in the court of one State or Province as against the legislative act of another, but would apply in a federal court in its original jurisdiction. If an Act of the Queensland Parliament authorized the Crown in right of that State to purchase or lease land in Tasmania from the Government of Tasmania, it would appear that no repeal of that statute and no statute of Queensland purporting to discharge or vary the obligations of the contract would have any validity in the High Court of Australia : the obligation was not governed by the law of Queensland. What is in the normal relations of countries no more than a rule of private international law becomes in a federal system, with common courts of original jurisdiction, substantially a constitutional limitation to be applied as between parties in that jurisdiction.

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[1] *A.-G. for New South Wales* v. *Trethowan,* (1931) 44 C.L.R. 394, 418 (Rich J.), 422 (Starke J.), 425–6 (Dixon J.).

[2] [1913] A.C. 283, 296. Cf. *Workmen's Compensation Board* v. *Canadian Pacific Railway Coy.*, [1920] A.C. 184, 191–2.

The propositions that a legislature cannot " bind itself " or " abdicate " its authority have relation to the case in which the will of the legislature is law, and are therefore aside from the question whether there is some other law under which the rights created—in the matter under consideration the relations created between governments under a legislative agreement—pass, and by which and not by the subsequent acts of the State rights must be adjudged. The agreement is in the case of each government the act of the Crown ; but, though " the Crown " and not the legislature is the principal in the transaction, it is the Crown as the *persona* of a community in the plenitude of its governmental powers, legislative or executive.[1] *Quoad* the other governments, the Crown in the legislature does not make a law but does an act in the name of the community, and the character of that act must be determined not as in a political community isolated from others, but as in a community where the several governments are linked under a common constitution. In the case of a sovereign State, the internal incompetence of a legislature to bind itself, if by constitutional law there is such incompetence, exists along with the capacity of the State in international law to bind itself with other and equal States. When within the ambit of constitutional law are included the relations of communities and governments equal and independent *inter se*, notions drawn exclusively from legislative power in the relation of political superior and inferior, governors and governed, are inadequate to the situation. It is this new conception which is embodied in the submission of States and Commonwealth, Provinces and Dominion, to the jurisdiction of a court as well as in numerous provisions of the Canadian and Australian Constitutions.

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[1] " The Constitution determines the mutual relations of States, considered not only as governments but sometimes also as communities "—(per Dixon J., *State of Tasmania* v. *State of Victoria*, (1935) Argus L.R., 157, 167). These words applied in another aspect of suits between States would aptly describe the relation here discussed. Cf. *ex parte Virginia*, 100 U.S. 339, 346—" Actions of the political body denominated as a State by whatever instruments or in whatever modes that action may be taken." *Home Telegraph Coy.* v. *Los Angeles*, (1912) 227 U.S. 278, 288—" Governmental capacity in a complete sense."

If there is no law other than the law of the one community or the other and as such controlled by its legislature, and if for this reason the contractual relation fails, the same principle would prevent obligations arising *quasi ex contractu*—expenditure incurred by one government on the faith of an agreement or at the request of the other, moneys received, collected or not collected by one in circumstances alleged by the other to entitle it to an account,[1] even if the dependence of quasi-contract upon the legal possibility of a valid contract between the parties, suggested by the observations in *Sinclair* v. *Brougham*,[2] did not apply to the case. There might be glaring injustice without either legal or political remedy. The negative result of a jurisdiction which must find that the plaintiff has no right whenever the defendant's legislature has said so, would impute to the constitutional powers of governments within the same system an absoluteness which international law denies to sovereignty itself. The conflict of powers arising from the omnicompetence of each legislature would be the more singular where, as in Canada and Australia, the powers of all are derived from a common authority.

The argument that an agreement, if "binding the legislature," would subject to the will of another government the exercise of the powers which have been committed to the legislature itself and therefore contradicts the grant of powers, demands further consideration. A principle of distinction between classes of cases may be found in the limits of jurisdiction of the court. The High Court of Australia has more than once affirmed the rights and obligations subsisting between individuals as the guide to the ascertainment of the legal rights of which the court has cognizance. That principle includes agreement as a category of right, but it would exclude agreements of which the subject of the mutual undertakings is the exercise of political power: the agreements are not such as are capable of existing between individuals, their subject-matter is the peculiar and exclusive characteristic of governments. Even an agreement of the Crown with an individual respecting the future exercise of discretionary powers—that they will or will not be exercised in a certain way—probably cannot be a valid contract.[1] Agreements for extradition, for the enactment or non-enactment or repeal of laws on any subject—that the one legislature will withdraw from industrial regulation or from a particular field of taxation, that measures will be enacted for avoiding double taxation, that States' legislatures in the Commonwealth will refer some matter to the Commonwealth Parliament—would be of this class. In such cases, the inability of the agreement to support legal rights would not await or depend upon some legislative act of renunciation or repudiation ; it would, it is conceived, be invalid *ab initio*, and would fail to establish a legal right on any basis, whether contract or statutory obligation, and would be unenforceable in court, even though the legislation of both governments stood, and though both were willing to submit the matter to the decision of the court ; a jurisdiction limited by subject-matter cannot be enlarged by consent of parties. It is not that such agreements are incapable of giving rights between governments so that as between independent governments they may not be appropriate matters of judicial determination in an international tribunal. But that is in a sphere where jurisdiction over matters or controversies between governments is not limited by association with suits between individuals or between governments and individuals, and where there is a more complete detachment from constitutional considerations than is possible in municipal courts.

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[1] Cf. *A.-G. for Ontario* v. *A.-G. for Quebec*, [1903] A.C. 39; *ibid.*, [1910] A.C. 637.

[2] [1914] A.C. 398. See pp. 415 *et seq.* (Lord Haldane), p. 452 (Lord Sumner).

The task of distinguishing the classes of agreement may not in all cases be easy, particularly in " mixed " agreements some of whose terms present one feature and some another. It is even possible that it may extend to exclude agreements in which every item could be conceived of as an agreement between individuals, but which were so comprehensive and far-reaching that on the whole they must be treated as removed from the category of individual or corporate agreements. But whatever the difficulties, the distinction exists, and it removes the most flagrant cases of attempts to bind power by agreement from the category of legal rights. For the rest, the fact that in the last analysis the most businesslike of agreements, if they are to withstand legislative assaults, are attempts to fetter the future exercise of legislative power, and are merely different in method from those which specifically deal with power, encounters the fact that public authorities and trustees, while unable by any agreement to fetter their discretionary power and so long as its exercise is still *in futuro* may by an exercise of that discretion effectively exercise the power itself and produce results binding in law and equity upon themselves.

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[1] Cf. *Rederiaktiebogalet Amphitrite* v. *The King*, [1921] 3 K.B. 500 ; *Watson's Bav South Shore Ferry Coy.* v. *Whitfield*, (1919) 27 C.L.R. 268, 277.

Tortious Liability.—In tortious liability, we have the cases of *South Australia* v. *Victoria*[1] (viewed as a case of trespass) and *Commonwealth* v. *New South Wales.*[2] But in the first, the claim was based directly on an Imperial statute and Orders thereunder; there was clearly a paramount law specifically applicable. The second presented merely the ordinary facts of a tort committed in New South Wales, and a liability of the government fully constituted under the State law. The pollution of air or water, the interference with the flow of waters either by subtraction or concentration, are ordinary matters of liability between individuals. If they cross State lines—emanate from property situated in the one State and are suffered by owners or occupiers of property situated in the other—how are they to be judged? What is *prima facie* a nuisance becomes no nuisance if it is authorized by statute. What is the position when the acts causing the damage have been authorized by the legislation of the State in which they are done? The case presents differences from the case of contract, since here there is damage suffered which has a territorial situation, and is outside the territory of the legislature enacting and within the territory of the complainant State. It is therefore closer to that specific territorial limitation of colonial legislatures, which is an established part of their constitutional law. But we have here the advantage of studying the situation in the comparable conditions of other federal countries.

United States.—In the United States, these cases of nuisance are among the commonest causes of action between States. The plaintiff State sues not for injury to its property, but in its political character[3] as protector of the persons and property within its territory and of the welfare of its community—an adaptation of the ordinary powers of the *parens patriae* to the constitutional relations in a federal system under the Crown, recognized in other connexions in a number of Australian decisions.[1] The defendant is sued for acts done under the authority of its legislation whether done by officers of central or local government, by independent officers or ministerial officials, or by private persons or corporations acting in their own interest under the assumed authority of the State.[2] In all such cases the act is treated as the act of the State itself if it be within the power which the State legislation purports to give: the ordinary rules of tort which distinguish between what is done in a mandatory capacity so as to engage the responsibility of the State itself and what is done independently under the law of the State have no application in this connexion. It is also to be noted that the question is not whether the cause between the States shall be determined by the law of the one or the other;[3] the determination of the rights of each as against the other is the ascertainment for each of the sphere within which its law begins to operate, and this ascertainment is made upon independent principles which have been judicially described as "inter-State common law."[4]

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[1] (1911) 12 C.L.R. 667; [1914] A.C. p. 283.

[2] (1923) 32 C.L.R. 200. Other aspects of the case have been dealt with elsewhere in this article.

[3] "For an injury to it in its capacity of quasi-sovereign"—*North Dakota* v. *Minnesota*, (1923) 263 U.S. 365. Cf. *Georgia* v. *Tennessee Copper Coy.*, 206 U.S. 230; *Kansas* v. *Colorado*, (1901) 185 U.S. 125, 142.

The ingredients of liability are the damage suffered or threatened in the plaintiff State, material damage of a sort remediable in courts; the causation of that damage by the action of the defendant State reaching through the agency of natural laws the territory of the plaintiff State; and the principle that damage so caused is an infringement of right unless justified. Neither can impose its law upon the territory of the other: there is equality in power and right.[5] The extent and the limitations of the powers of each, in a system which excludes the recourse available in international relations and which provides for the adjudication of controversies among the States, are matters not of moral but of legal right;[6] they must be determined having regard to the "equal level or plane on which all the States stand in point of power and right under our constitutional system."[1] In the ascertainment of these rights, international law may be relevant[2] without being conclusive: in the situation of the parties there may be rights and obligations other than international law provides. On the other hand, the case between these parties is not necessarily governed by the mere application of those rules belonging to private suits in both the States (where they concur) or by the common law where those laws differ.[3] Regard is had to a situation which includes physical, climatic and geographical conditions and the responsibilities of each government for the welfare of its community. It is in the application of principles according to the circumstances of the particular cases that the Supreme Court has averred that "through these successive disputes and decisions, this Court is practically building up what may not improperly be called inter-state common law."[4]

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[1] E.g. *A.-G. for New South Wales* v. *Brewery Employees Union*, (1908) 6 C.L.R. 469; *Commonwealth* v. *New South Wales*, (1920) 29 C.L.R. 1, *State of Tasmania* v. *State of Victoria*, (1935) Argus L.R. 157.

[2] Pollution of waters—*Missouri* v. *Illinois*, (1901) 180 U.S. 208, (1905) 200 U.S. 496; *New York* v. *New Jersey*, (1921) 256 U.S. 296. Deprivation of waters—*Kansas* v. *Colorado*, (1901) 185 U.S. 125, (1907) 206 U.S. 47; *Wyoming* v. *Colorado*, (1922) 259 U.S. 419; *Connecticut* v. *Massachusetts*, (1930) 282 U.S. 660. Deprivation of natural gas—*Pennsylvania* v. *West Virginia*, (1922) 262 U.S. 553. Increase of flow of stream—by drainage works—*North Dakota* v. *Minnesota*, (1923) 263 U.S. 365, 582.

[3] Cf. *Kansas* v. *Colorado*, 206 U.S. 46; *Wyoming* v. *Colorado*, 259 U.S. 419; *Connecticut* v. *Massachusetts*, 282 U.S. 660.

[4] Per Brewer J., *Kansas* v. *Colorado*, 206 U.S. 46, 98.

[5] Cf. *Kansas* v. *Colorado*, (1907) 206 U.S. 46, 95, 97–8 (Brewer J.).

[6] Cf. *Missouri* v. *Illinois*, (1900) 180 U.S. 208, 241; *Kansas* v. *Colorado*, (1901) 185 U.S. 125, 143 *seq.*

Germany.—In Germany, the jurisdiction of the Staatsgerichtshof under Art. 19 of the Constitution of 1919 was invoked in *Würtemberg* v. *Prussia and Baden* in circumstances similar to those of the States-waters cases in the United States. The Court held that in the exercise of jurisdiction in a suit between States outside the domain of private law, it was impossible to apply the municipal law of a single State; that international law applied at any rate in the sphere of the exclusive competence of the States, but that the relation in a federal community being closer than that of the international community, the duty of reciprocal consideration of interests was more intensive than in the relation of other States. International law limited the rights of each of the States through which a river flowed by a duty not to injure the other's rights, a duty, however, which was not absolute but required that the interests of each should be weighed—the injury to the one with the advantage to the other.[5] The result is similar to that reached in the Supreme Court of the United States.

Switzerland.—In Switzerland, disputes as to the respective rights of cantons to water in rivers or streams flowing from the one to the other have been determined in the Federal Court on the principle that there are rights in each which the other must respect; that neither in shaping its policy and laws may be regardless of the interests of the other, and that these must be determined in case of conflict on the basis, first, of equality among the cantons, secondly, of the situation of the cantons as political communities and not on the rights arising out of property.[1]

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[1] *Connecticut* v. *Massachusetts*, 282, U.S. 660.

[2] *Kansas* v. *Colorado*, 206 U.S. 46, 97.

[3] *Ibid.*, pp. 98, 100, 101. Cf. *Wyoming* v. *Colorado*, 259 U.S. 419. *Connecticut* v. *Massachusetts*, 282 U.S. 660.

[4] *Kansas* v. *Colorado*, 206 U.S. at p. 98.

[5] *Ann. Dig. Int. Law*, 1927–8, Case No. 86.

Federal Principles.—The importance of the cases under other federal constitutions respecting torts is first of all that, not being complicated as are cases of compact or agreement by special constitutional provisions, they present the relations in the light of general principles. In the second place, in spite of the difference in legal systems, there is a striking concurrence both in those principles and in their application: that the relation of governments in a federal system is more emphatically than the relations of States in the international system a regime of law; that the fullest extent of legislative power in either government of necessity is subject to some limitation in virtue of the like power in the other, the powers of each being of equal validity in the common tribunal, so that the appeal to law is an appeal to some standard which controls the legislative enactments of both; that the law is one which takes account of the nature of the parties as governments, and the situations which belong to their duties and responsibilities, that the analogy of private law in private relations must not be too closely pressed, and that, on the other hand, without rejecting public international law the special relations of the parties may affect the application of its rules.

The Privy Council and a Governing Law: Canada.—The most explicit discussion and consideration of the standard of decision in controversies between governments is to be found in the arguments and judgments in *Dominion of Canada* v. *Province of Ontario.*[2] It is the more interesting because the judgments in one view of them confine the issue to a choice between the law of the Dominion and the law of a Province, and may appear to reject the notion of an independent law binding both, in cases where a title to right is not to be found in the Constitution or other Imperial Act. The Dominion, acting within its constitutional powers, had made a treaty with Indian tribes for the extinguishment of Indian rights over a tract of territory, and in consideration thereof undertook financial obligations to the Indians. The territory was subsequently found to form part of the Province of Ontario, so that the Indian rights enured to the benefit of the Provincial Government, and the Dominion now claimed to be recouped for the expenditure and the liabilities undertaken to the extent of the benefit received by the Province. Faced with the restrictive view of "unjust enrichment" in the common law, as expressed in such cases as *Ruabon Steamship Coy.* v. *London Assurance Coy.*,[1] the Dominion pointed out that Canada was not a purely common law country; that the civil law in force in Quebec had an equal claim to consideration in determining the principles to be applied as between the Dominion and the Provinces, and the law of *mandatum* and *negotiorum gestio* regarded claims of this nature more favourably than did the common law. Possibly also, the appeal to the civil law was a suggestion that, where the common law was inapplicable, it presented an alternative set of legal principles which in view of the association of the civil law with international law gave the proper measure for the decision of suits between governments: in the Privy Council, counsel for the Dominion argued that, if no principle of municipal law was found applicable, recourse should be had to international law, and this law it was contended would sustain the claim. It was a further argument for the Dominion that if none of these standards furnished an authoritative principle, the question must be worked out according to the justice of the case, with due regard to the constitutional relations set up by the British North America Act, an argument that was apparently understood in both courts as an invitation to decide according to the *arbitrium boni viri*. The Province of Ontario, while rebutting the inferences drawn in favour of the Dominion from the principles invoked, set up a competing standard of decision: the governing law was the law of Ontario, because the treaty was "a contract with regard to lands in Ontario."[2] In the Supreme Court, the law of Ontario was accepted by Idington J. as the law of the place in which the land, the subject of the controversy, was situated, and perhaps by Duff J. (in whose judgment McLennan J. concurred) in the statement that the court was not authorized to apply to a controversy a rule or principle prevailing in one locality when according to accepted principles it should be determined upon the law of another locality. But the observation of Duff J. may have a narrower scope and be limited to the invocation by the Dominion of the civil law principles applicable to *bona fide* possessors of land who have paid off an incumbrance, an argument answered by the consideration that those principles could have no application where land is situated in a jurisdiction where the *lex situs* is not the civil law. Both the Supreme Court and the Privy Council insist that to succeed the plaintiffs must bring their claim within some recognized legal principle : the court had no authority to determine controversies only according to its own view of what in the circumstances might be thought fair. They were satisfied that the claim could not be sustained on any principle of law that could be invoked as applicable. That may mean that none of the legal standards to which the Dominion appealed—civil law or international law or common law—supported their contention, so that it was unnecessary to decide which of them was the governing standard. The most explicit reference by the Privy Council to the governing law is indeterminate. Their Lordships say : " It may be that in questions between a Dominion comprising various Provinces of which the laws are not in all respects identical, on the one hand, and a particular Province with laws of its own, on the other, difficulty will arise as to the legal principle to be applied. Such conflicts may always arise in the case of States or Provinces within a union. But the conflict is between one set of legal principles and another." That suggests that where the law of each for private relations is the same, that furnishes the law between the governments in comparable cases,[1] and that where the laws differ, the sole question is as between those laws : the one or the other applies, and nothing else may be considered. The question, of course, is a peculiarly complicated one —not merely whether the law of Ontario or the law of the Dominion applies, but what is the law of the Dominion, an area where different legal systems prevail. Quite probably, when the Privy Council says " the conflict is between one set of legal principles and another," it does not mean to lay down that the case must be governed by the law of one or other of the conflicting governments, for the whole passage occurs in that part of the judgment which is concerned with rejecting a discretionary or arbitral power, and the mind of the court is directed less at that point to the choice between competing legal standards than to legal standards on the one side as against moral standards on the other. Actually the principles by which the

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[1] See the case of *Aargau and Zürich,* 15 *Am. Jnl. Int. Law,* pp. 169 *seq.* On the position in Germany and Switzerland generally, see Lauterpacht, *The Function of Law in the International Community,* p. 451.

[2] (1908) 42 S.C.R. 1; [1910] A.C. 637.

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[1] [1900] A.C. 6.

[2] 42 S.C.R. at p. 19.

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[1] This has been recognized in the United States in certain circumstances, but it is by no means true universally that a law apt for private relations is applicable to the condition of governments and is to be applied in their controversies. Cf. *Wyoming* v. *Colorado*, (1922) 259 U.S. 419, 465–70, and *Connecticut* v. *Massachusetts*, (1930) 282 U.S. 660, 669–71.

Privy Council and in the main the Supreme Court of Canada tested the case were those of common law and equity as applied to the relations of governments under the British North America Act. Agency and trust, the payment of a mortgage by a *bona fide* possessor, were dismissed, and the principle that no claim for indemnity or contribution arises where expenditure incurred by one party for reasons deemed by him to be good and sufficient has enured to the benefit of another [1] was applied to the obligations of a government incurred in the exercise of its constitutional powers and enuring to the benefit of another government existing and operating under the same constitution. This was fortified in the judgment of the Supreme Court of Canada by the further constitutional consideration that the established relation of Dominion and Provinces was irreconcilable with a power of the Dominion to dispose without the consent of the provincial legislature of provincial property and revenues by fastening upon a Province financial obligations.[2] The Privy Council may have invoked the principles of English law as part of the law of Ontario or—disregarding for whatever reason the civil law of Quebec—as the law of both the parties, or again because the main question related to the legal consequences of an exercise of power under the British North America Act, a British statute, and the relations of governments set up by that statute, and they found nothing in the circumstances to displace the considerations ordinarily applicable to such a statute. But if it was as the law of Ontario that the principle was applied, some questions present themselves. The treaty would have enured to the benefit of both Ontario and Quebec if the territories concerned had been partly situated in both Provinces. Then, if the civil law in Quebec did, as was argued, provide for contribution, that Province would have been liable to the Dominion while Ontario was free, an unequal result of the same transaction which would *prima facie* be unjust. That injustice, however, Quebec could seemingly have prevented by altering its law, for there is nothing to fix the law applicable as at a certain date. If the underlying principle was the identity of the law of the Dominion and that of the Province, then—on the same assumption as to the law of Quebec—there would be a divergence of that law if Quebec and not Ontario was the Province interested, and the law of the Dominion was taken to be the common law. Moreover, the exploration of agency and the relation of trustee and beneficiary by the courts shows that in their opinion there might be facts which would impose an obligation on the Province, as, for instance, if its government with the assent of the provincial legislature had agreed to reimburse the Dominion and the Dominion had made the Indian treaty on the faith of that agreement : the claim of the Dominion would have been founded on some recognized legal principle. Supposing that then the Province, having come under obligation to the Dominion and received the benefit of the extinguishment of the Indian rights, proceeded to repeal the Act on the faith of which the Dominion had made the treaty, or by other apt expression of intention repudiated its liability to the Dominion, could it have resisted successfully the claim of the Dominion ? If not, it must be because a relation had been created which was governed by some law superior to the enactments of the provincial legislature. The Dominion on its part could not by its law impose the obligation on the Province.

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[1] [1910] A.C. at p. 646.

[2] 42 S.C.R. at p. 130.

Australia : the " Law of the Empire."—In two cases in Australia [1] between governments, reference has been made to the " law of the Empire " " binding as well upon the dependencies regarded as political entities as upon individual subjects," and it was laid down that "if any dependency infringes the law of the Empire governing its relations with a neighbouring dependency it is guilty of a wrong towards that other dependency." In both cases the law invoked was Imperial legislation dealing specifically with the places concerned and operating there. In *South Australia* v. *Victoria* there were the Imperial Act and Letters Patent thereunder establishing the Province of South Australia and declaring its boundaries ; there was also the Commonwealth Constitution setting up the High Court of Australia and conferring its jurisdiction. In *Commonwealth* v. *New South Wales* there was the same provision of the Commonwealth Constitution. There was nothing in either case to carry the matter farther.

The Common Law in the Federation.—The matter of a federal common law has been discussed in the United States, in Canada and in the Commonwealth.[2] In *The King* v. *Kidman* [3] the question was raised whether there was any " common law in Australia independent of the common law which forms part of the law of the several States." Griffith C.J. answered that question by saying that the colonists carried the common law with them, and that, as separate colonies were set up, that law was not disintegrated into six separate bodies of law although it became part of an identical law applicable to six separate political communities.[1] Isaacs J. said :

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[1] *South Australia* v. *Victoria*, (1911) 12 C.L.R. 667, 676—Griffith C.J. ; *Commonwealth* v. *New South Wales*, (1923) 32 C.L.R. 200, 205—Knox C.J., citing *South Australia* v. *Victoria*.

[2] See Willoughby on the Constitution of the U.S. c. lxxii ; Lefroy, *Canada's Federal System*, p. 127 note ; Kerr, *The Law of the Australian Constitution*, c. iv ; Keith's *Responsible Government in the Dominions*, p. 608.

[3] (1915) 20 C.L.R. 425.

> The common law of England was brought to Australia by the first settlers, and remains as the heritage of all who dwell upon the soil of this continent in full force and operation, except so far as it has in any portion of the land been modified by a competent legislature. For State purposes and jurisdiction, State laws may provide differently. But they cannot restrict the operation of the Constitution, and whatever it implies is the law of Australia, as much as if it were expressly so written . . . there is a peace of the Commonwealth, not because there is a special common law of the Commonwealth, but because the common law of Australia recognizes the peace of the King in relation to his Commonwealth by virtue of the Constitution just as it recognizes the peace of the King in relation to each separate State.[2]

No doubt here as elsewhere general observations must be considered in the light of the particular case. It being an offence at common law to obstruct the King's government in the execution of its powers, and that being not the less an offence that the government obstructed was the Commonwealth Government and not the State government, the question was whether this law was merely State law, vindicated solely by State action, or was it Commonwealth law to be vindicated by Commonwealth prosecution, so that the prosecution became a matter in which the Commonwealth was a party and therefore cognizable in the original jurisdiction of the High Court under s. 75 (iii) of the Constitution. Isaacs J. supported his general proposition by illustration from United States cases in other fields in which the doctrine of a general common law has been acted upon. The Court held that the Commonwealth was a party, the learned justices other than Griffith C.J. and Isaacs J. committing themselves to nothing on the subject of a federal common law.

With these observations in the High Court of Australia may be compared a vigorous challenge to the doctrine of a general common law of the United States in a recent judgment of Holmes J.[3] The

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[1] Pp. 435–6.

[2] P. 445.

[3] *Black and White Taxi-Cab and Transport Coy.* v. *Yellow Taxi-Cab Coy.*, (1927) 276 U.S. 518, 533–4.

This is not the place to consider the various departments in which the notion emerges in the working of the Constitution of the United States, its intricacies and its varying significance in relation to federal or State legislation. The case before the Court was one in which the doctrine as applied would not prevent the alteration circumstances were not the same and the observations are found in a dissenting judgment (in which Brandeis and Stone A.J.J. concurred), but their generality, the vigour of their expression and the interest that attaches to the views of the author of *The Common Law*, give them a peculiar importance in relation to the theory under discussion. The learned justice said:

> It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only test of any court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it, unless and until changed by statute, the courts of the United States might be right in using their judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word with different meanings, but law in the sense in which courts speak of it to-day does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally, but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.[1]

It will, of course, not be overlooked that this was a dissenting judgment. Moreover, if the refusal of federal courts to accept State decisions has as its essential base the " one august corpus," then that doctrine of a " transcendental body of law " has been long established in the United States, for the Taxi-Cab case was not a novel case of practice, but one merely of the extent of an existing practice.

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of the law for the State by the State legislature ; it therefore differs from these cases in which the doctrine supports the existence, in the absence of legislation by Congress, of a law of general operation outside the range of State interference, the matter envisaged by the American cases referred to in the High Court of Australia. The immediate question in the case was one of " practice." When the federal courts are exercising jurisdiction merely because of the character of the parties (as *e.g.* that they are citizens of different States) and the case presents no question under the Federal Constitution or the laws of the United States, they are accustomed to accept the decisions of the highest State court in matters of State law and not to proceed to an independent consideration of what that law is. There are, however, some matters which they do consider for themselves—among them, all principles of equity and under a much-discussed decision of the Supreme Court (*Swift* v. *Tyson*, 16 Peters 1) general commercial law. There is a tendency to extend these categories, and in the Taxi-Cab case the majority of the Supreme Court in effect did extend them to all cases of common law in which there were no special considerations of a local character. The dissenting judgment regarded this as an unconstitutional assumption of powers by the United State courts in virtue of a fallacy arising from " the common law." The application of the views of the minority to the case before the court was that just as the federal courts could not in such a matter go behind any alteration or declaration of the State law made by the State legislature, they must be bound by the other voice of the State, speaking in the absence of legislation, viz. its courts.

[1] Pp. 533–4.

Holmes J. conceded that that practice has a considerable tradition behind it, and referred to a dissenting judgment of his own as far back as 1909,[1] in which he protested against its application in any but a restricted field.

Its Significance in the Relations of Governments.—The view presented by Griffith C.J. and Isaacs J. is full of significance in various federal relations, and one of these appears to be the law applicable to the relations between governments. The question has been whether, apart from some applicable provision of the Constitution or other Imperial Act operating by way of paramount legislation, there is any legal *nexus* under which rights could arise between them, any standard of decision, other than law, conceived of as the law of one or the other bounded by its territory and alterable by its legislature. In other words, while there might be rights under the law of Commonwealth or State against the Crown conceived of as a " subject " of that law, could there be rights against the Crown, conceived of as representing the community in the plenitude of its legislative power ? The doctrine of a " common law " of Australia may contain the answer both to this question and to the question what the law is.

The reception of English law (which, of course, is not only the " common law " in its technical sense) in Australia was not the act of separate countries ; there was an original institution or inheritance of that law through authority itself legal in character. As the territory received legislative administrative and judicial organs, these operated within and only within the boundaries prescribed, and subject to the limitations whether of territory or subject-matter imposed upon them. But the mere establishment of these organs did not impair the generality or unity of the law. Except so far as the law was altered by a legislature within the limits of its competence the unity of the received law was as complete as that of Imperial legislation operating in Australia ; whatever was beyond the competence of legislatures remained under this law—there was no gap. To say that because " what the sovereign permits he commands " there is the negation of a single law, that law exists merely as separate laws within the limits of a number of insulated enclaves, is to press too far the dependence of law upon legislative power. So long as the only legislatures in Australia were the separate colonial legislatures, the unity of the received law was obscured or immaterial, though perhaps it was more or less consciously acknowledged in what appears to have been the practice in colonial courts of taking judicial notice of the "common law" in another colony while requiring proof of its statute law as in the case of foreign law.

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[1] *Kuhn* v. *Fairmont Coal Coy.*, (1909) 215 U.S. 349.

The institution of federalism, and the establishing of a court which was not the court of one State or of all the States severally regarded, but the court of a single Commonwealth which included all, revealed new aspects of law. Whatever the competence of colonial legislatures and State Parliaments in comparable matters of their own government, it did not extend beyond; and in the new relations and the new institutions, the law of Australia—the "common law" in its extended sense—is there to apply to the subject-matter. In some cases, it will be liable to alteration by the Commonwealth Parliament, *e.g.* the common law powers of the executive in right of the Commonwealth may be added to or abridged, the rules for the interpretation of Commonwealth statutes may be altered. In other cases, it is so far essential to the Constitution itself as to be unalterable by any legislature in Australia. In either case it is not a new system imported with the Constitution, or a separate appanage of Commonwealth government; it is the application in new conditions of an existing "law of Australia." For this reason—and because it is in some cases subject to alteration by the Commonwealth Parliament—it may be inapt or inadequate to regard it as implied in the Constitution. Is it "implied" for any other reason than that it is law?

For the relations of governments the significance of a common or general law is that there is no region or matter, person or entity outside it. Law is not enclosed and confined in the political framework or "sovereignty" of the several States, nor may such expressions as "the law of the State" induce us to regard law itself as a sort of State possession. There are no gaps; not merely is there no "blind alley of non-liquet,"[1] but a well-furnished body of law is to hand. Like the law of the Empire referred to in *South Australia* v. *Victoria*,[2] it is "binding upon the dependencies regarded as political entities as upon individual subjects." Without formal break from one "system" to another "system," without passing from the plane of municipal law to that of international law, it binds the governments in their relations with each other until it has been altered by whatever legislature may be competent; if the particular

[1] Cf. Lauterpacht, *The Function of the Law in the International Community*, p. 53.

[2] (1911) 12 C.L.R. 667, 676.

matter lies beyond the scope of the legislature that has dealt with it, the law, of course, remains.

An objection to this point of view may be founded on the Colonial Laws Validity Act, 1865, s. 3 of which provides that no act of a colonial legislature shall be void or inoperative on the ground of repugnancy to the law of England unless it is repugnant to some Act of Parliament extending to the colony or to some Order or Regulation thereunder. The objection does not apply *in limine*—to the existence of a common or general law which applies in the relation of governments so long as neither legislature has purported to alter it. But where one of them has affected to alter it, it may be said that to set up against the statute the law of England is to do the very thing which the Colonial Laws Validity Act forbids. To that there may be more than one answer. First, if the objection to the act of the legislature arises from the existence of the federal relation, the powers and limitations in the Federal Commonwealth, the question becomes one of accord or lack of accord with an Imperial Act, the Commonwealth Constitution itself. In the second place, it may be said that s. 3 merely removed obstacles to the operation of colonial acts enacted within the field of the legislature's competence; it did not extend the field itself. The basis of the view challenged is that there is a field of matters or relations outside the competence of the legislatures just as there are territorial areas outside competence.[1] In the relations of governments such a field exists where if there were no law between them, and the omnipotence of each legislature was the postulate of decision, there might be a contradiction of legal voices in a tribunal before which neither legislature can claim a supremacy over the law of the other, where therefore their equality demands some limit of their constitutional authority.

Inappropriate to Canada.—The doctrine of the generality of the common law as a law among and between the political units meets in Canada the difficulty presented by the existence of two legal systems. In the United States, the case of Louisiana was adverted to by Holmes J.[2] among his reasons for attacking the doctrine there. But Louisiana was not an original State of the Union, and fundamental relations had been formed before the cession. The difficulty seems to have been overcome by practical considerations: if and when a single law is necessary, it is to be found in the law generally prevalent in the Union, disregarding the exceptional case of a single State. In Canada, Quebec was not a later acquisition but an original Province, one of the two chief Provinces in the original four. Her distinctive national character is marked in Canadian life and institutions; it was a principal reason for the substitution of a federal union in 1867 for the incorporate union of 1840. Whatever unity or generality in law the federal system may require, its principle cannot be found in the universality in Canada of a particular system, whether common or civil law, and this consideration enters, of course, not merely into relations to which the Province of Quebec is a party, but into all relations of the Dominion of Canada: the difficulty was illustrated in the arguments, particularly before the Supreme Court of Canada, in *Dominion of Canada* v. *Province of Ontario*.[1] The subject of a law between governments must therefore be approached from a different angle if it is to include Canada within its scope.

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[1] The analogy is pointed out in another connexion by Isaacs J., in *A.-G. for New South Wales* v. *Brewery Employees Union*, (1908) 6 C.L.R. at p. 557.

[2] *Black and White Taxi-Cab and Transport Coy.* v. *Yellow Taxi-Cab. Coy.*, (1927) 276 U.S. 518, 533–4.

Law permeates Federalism.—Federalism, as Dicey said, is legalism. The Constitutions setting up a federal system are permeated by law; in a federal community not a step can be taken in government nor is any thought about government possible except in the light of some established law. In part because they are legal instruments, but more because they are not "legal codes" with any pretence to self-containment, their brevity and allusiveness are full of assumptions requiring elucidation at every stage by law. This postulates a large measure of legal unity; the Constitution cannot be different things in different parts of the country. Both in Canada and Australia there are the vital facts of the foundation of the Constitutions by Acts of the British Parliament, the unity of the Crown and its implications in all the governments, the powers and attributes of the Crown in right of the one or the other government, the prevalence of responsible government and the law that has grown up around it, the extent of executive power where there has been no legislative enactment, the relations of the various sorts of executive acts (*e.g.* the making of contracts) to Parliamentary taxation and appropriation of public moneys, the representation of the Crown in right of the several governments or communities in the courts and the conditions in which the representation is permissible, the nature of the judicial function and its relation to non-sovereign legislatures, the rules for the interpretation of statutes—all these are assumed or debated and considered on the basis of a law which is postulated as co-extensive with the Constitution itself. And this law is not a mere collection of particular and isolated rules; whenever in a concrete case a court applies a rule, what it does is to draw from " the law "—the unity of related concepts and principles and policies with potentialities of development and adaptation controlled and set in motion by an established method and technique—the rule that the law makes appropriate to the facts.[1] Neither the " special " nature of the jurisdiction nor the fact that legislatures may have power to make laws only with respect to prescribed matters must lead us to conceive of a legal background and setting, limited merely to certain specific rules for service with the Constitution, borrowed and detached from law as a whole.

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[1] (1908) 42 S.C.R., [1910] A.C. 637. See *ante*.

The Law in the Federal Tribunal.—When it has been affirmed by courts and jurists[2] that the mere establishment of a court is the substitution of law for will as the basis for decision, the truism implies more than is immediately realized.

Just as the subjection of the Crown in right of the several governments to jurisdiction excludes all notion of immunity from suit, whether based on the prerogatives of the Crown or the supposed inherent nature of a sovereign or quasi-sovereign community,[3] so the notion of law imports a law co-extensive with the Dominion or the Commonwealth itself, to which both Crown and individuals are subject: law—as was said of " the law of the Empire " in *South Australia* v. *Victoria*[4] " binding as well upon the dependencies regarded as political entities as upon individual subjects." It is not a series or chain of laws or systems of law, but law. Whether courts create or find law, whether law is properly to be regarded as a direction to or function of courts or as a rule of conduct for the citizen, what is law is to be determined by the court. In this sense, the law in every court is its own law. This has a special significance for such a court as the Supreme Court of Canada or the High Court of Australia (or, one may venture to add, the Supreme Court of the United States) in the exercise of its original jurisdiction. We are accustomed to emphasize the duty of courts to recognize the law's capacity for adaptation to new situations. The first new situation to which such a federal court (not exercising merely an appellate jurisdiction) has to adapt itself is its own. It is not a domestic or a foreign or an international *forum* in respect of the persons and matters before it ; it is something of all three, and not in the sense that in one case it is in one capacity and in another case in another capacity, but in the sense that all three characters may present themselves in the same case. We are thus brought at once with a more vivid consciousness than in either purely international or national courts to the universal and general features of law itself—to law in its abstract conception. It invokes a number of fundamental notions which attach at once and without more, regardless of one or other " system " of law. An apparatus for the administration of justice, some conception of the nature of judicial power ; an equipment of notions, categories, relations and distinctions ; a technique and method of investigation, thought and reasoning : all this belongs to the character of law itself. It is recognized in the assumption of a " science of law " and is involved in law whatever the tribunal which is concerned with its applications. The disputes upon these matters are in the main differences in opinion and not in authority, and wide differences in opinion are compatible with substantial concurrence in results.

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[1] Cf. Coke—" The law is like a deep well wherefrom each man draweth according to the strength of his understanding " (cited, Holdsworth, *History of English Law*, vol. v, p. 458 n.).

[2] *Rhode Island* v. *Massachusetts*, (1838) 12 Peters at p. 787; Warren, *The Supreme Court and Sovereign States*, p. 67.

[3] Cf. *Commonwealth* v. *New South Wales*, (1923) 32 C.L.R. 200.

[4] (1911) 12 C.L.R. 667, 676.

The legal community extends beyond the framework of the administration of justice into the substantive principles, doctrines, maxims, standards and rules to be applied in concrete cases, whether in national or international courts. There is a vast area that is the common possession of civilized countries, at once the product and the testimony of their civilization, and this is at the service of any court in search of law except so far as it is inconsistent with some authority which binds the court.

Circumstances may have established a closer connexion in the law among some countries. Those countries which have received their Constitutions from the British Parliament, which are under the Crown, have perforce a large common stock of principles in their public law and institutions, and this is a major fact in the British Empire itself.[1]

In Canada, notwithstanding the French origin of Quebec law and its embodiment in a code, the common stock of principles and rules in the common law and the civil code must be increased by numerous contacts—a Constitution, in the preamble of the British North America Act, establishing both federal and provincial governments, expressed to be similar in principle to the Constitution of the United Kingdom; the criminal law which even in Quebec is based on English law; the wide field of Dominion legislation and its interpretation; the influence of a common court of appeal—the Supreme Court and the Privy Council—and the similarity of method which accepts the authority of judicial decision with its consequences in the development of law. In Australia there is, of course, the universality of "the common law," in its extended sense, which will be "the law" so far as it is applicable to the situation (with all its capacity to meet new situations), and except so far as it has been displaced by the enactments of a legislature competent to govern the situation.

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[1] Cf. Mr. Mackenzie King, July 23, 1926, in Berriedale Keith's *Speeches and Documents*, 1918–31, pp. 156 *et seq.* ; *Quarterly Review*, April 1933, pp. 211–12 (W. Harrison Moore).

"Law of Canada," "Law of Australia."—The significance of this is that the supreme federal court in the exercise of its original jurisdiction will find law ready to its hand without asking questions about one "system" or another. It may be called "the law of Canada" or "the law of Australia" provided we do not identify it with legislation of the Dominion or Commonwealth Parliament. If it is claimed that a cause is governed by the legislation of Dominion or Commonwealth, Province or State, that involves recourse to the powers given and withheld by the Constitution; as between Provinces or States, it may also involve analogies to private international law, as already pointed out. The claim of either legislature must be established affirmatively, with the result that there may be matters in which neither the one nor the other legislature can establish a claim to govern.[1] There are questions of the competence of legislatures, but there is no question regarding the presence of law. The court which finds the suggested legislative rule inapplicable is brought back to its original position: it must apply "its own law"—the principles and rules which in the absence of competent legislation are appropriate to the matter. Where as in Australia the non-statutory law is uniform, there is at any rate no conflict in the material which the ordinary municipal law can contribute. In Canada, the existence of the civil law or civil code in Quebec and the common law in the rest of Canada may involve a competition of principles. In such a case, it is submitted, the court would not say that in a conflict of equal authorities there was—if not "no law"—at any rate no right that could be established and therefore a failure of the claim presented. The court is not in face of a conflict of systems each with its own equal authority. It is in a position common enough in the experience of courts: a stage is reached where the law is uncertain and has to be sought and ascertained. This brings into operation all the methods and resources of judicial reasoning. How widely such a search may range we are continually reminded. It has no national barriers and courts may find conviction of the soundness of their own reasons,[1] or have direct recourse to the principles enunciated, in a foreign law.[2] Both the supreme tribunals in the British system—the House of Lords and the Privy Council—are continuously in contact with the common law and the civil law, and Lord Macmillan has reminded us of the significance of this when he tells us that Stair's *Institutes of the Laws of Scotland* have recently furnished the rule for settling the ownership of an island in a Burmese river and the right of fishing in an Indian river.[3] Among the materials before the court in the case suggested are the different rules of the common law and the civil law, just as in the United States among the common law States themselves there have been, without legislation, different rules for

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[1] In *A.-G. for Ontario* v. *A.-G. for Canada*, [1912] A.C. 571, at p. 584, the Privy Council said: "Whatever belongs to self-government in Canada belongs either to the Dominion or to the Provinces within the limits of the British North America Act," and this has been cited in relation to the Australian Constitution in *Smith* v. *Oldham*, 15 C.L.R. 360, 365, and *Colonial Sugar Coy.* v. *Commonwealth*, 15 C.L.R. 182, 214. The dictum is, however, met by Lord Haldane in a subsequent case with the observation that "it is not an expression you must ride to death, because in the case of the Constitution of Canada, enormous though the powers are, there are some things that are not delegated, with regard to the succession to the Crown and matters of that kind"—quoted in Lefroy's *Constitutional Law of Canada* (1918) from the shorthand report of the arguments in *A.-G. for British Columbia* v. *A.-G. for Canada*, p. 91. The case is reported in [1914] A.C. 153. What "belongs to self-government in Canada," whether it includes external matters such as the reception of a judicial appeal from Canadian courts by H.M. in Council, is under consideration at the time

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of writing (May 1935) in *British Coal Corporation* v. *The King*. In internal matters, both in Canada and Australia, there are various matters beyond the reach of both legislatures; the *Initiative and Referendum Case*, [1919] A.C. 935, and the New South Wales Legislative Council case (*A.-G. for New South Wales* v. *Trethowan*, [1932] A.C. 526), are illustrations: the negation of the power claimed by the Provincial or State legislature did not affirm that the power was in the Dominion or Commonwealth Parliament.

[1] Cf. *North Shore Railway Coy.* v. *Pion*, (1889) 14 A.C. 612, 620 (Lord Selborne's observations on *Lyons* v. *Fishmongers Coy.*).

[2] Cf. *McLean* v. *Clydesdale Bank*, (1883) 9 A.C. 95, 105 (Lord Blackburn); *Durant* v. *Roberts*, [1900] 1 Q.B. 629, [1901] A.C. 240; *Sinclair* v. *Brougham*, [1914] A.C. 398, 432 (Lord Dunedin). And see *Cambridge Law Essays—Roman Law in Modern Cases*, by D. T. Oliver.

[3] *Scottish Law Review*, Nov. 1934, pp. 82–3.

the appropriation of natural waters, which have not prevented the Supreme Court from finding a rule of law for the relation of the States. If the rule of either is plainly traceable to some special condition or history, giving it an eccentric character out of harmony with the system to which it belongs or with the law established in the court itself, its value will be slight. As the task of the court is the application of rules of law to the relations of equal and independent governments, if one of the competing rules is more appropriate to the cause and the parties than is the other, it has a stronger claim to be the rule to be applied by the court. It may, of course, be that a satisfactory answer to the question—what is the law in the cause between the parties—is not to be found in the private law of either, whether they are in accord or in conflict.

Adaptation of Law to Relations of Political Communities.—Into the application of law to the relations of political communities, novel considerations will enter. That novelty is no bar either to jurisdiction or the ascertainment of rights is a well-established principle.[1] Progressiveness, adaptiveness, the duty and capacity of the courts without transcending their judicial function to meet new situations, is not merely a characteristic of English law and the English legal method, but is probably conceived of as a part of the nature of law.[2] The resources of adaptation are illustrated in the Commonwealth in the development whereby trespass by way of intrusion on territory is extended to intrusion upon power, and intrusion extended from acts of executive or judicial organs to the act of legislation itself,[1] as also by the practice in which the protective intervention of the Attorney-General is available to one government against another.[2] In Canada, it is pointed out in *A.-G. of Ontario* v. *A.-G. of Canada*[3] that while the principles governing the relations of individuals are in many respects apt for governing the relations of governments they do not cover the whole ground. In the United States, while the concurrent law of two States may furnish a rule of decision between them,[4] there may be situations in which the application of the rule of private law would be inappropriate to the controversies of governments.[5]

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[1] In international as well as in municipal law. Cf. *Ann. Dig. Int. Law*, 1923–4, Case No. 225, where the court adverts to "the method of jurisprudence" as the recourse in the international as in the national system.

[2] In *constitutional law*, cf. *Commonwealth* v. *Colonial Combing etc. Coy.*, (1922) 31 C.L.R. 421 : ". . . the flexibility of the common law and its capacity to adapt its principles to the changing circumstances of the life of the community no less than to that of the individuals that compose it. It is the duty of the Judiciary to recognize the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter," per Isaacs J. at pp. 438–9. Cf. two recent cases in the Privy Council :

International law is a "living and expanding code"—"a careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinion"—*In re Piracy jure gentium*, [1934] A.C. 586, 592, 600. *Roman-Dutch law*—"That law is a virile living system of law ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organized society"—*Pearl Assurance Coy.* v. *Government of the Union of South Africa*, [1934] A.C. 570, 579.

In *general*, see Pollock's *First Book of Jurisprudence* and *The Expansion of the Common Law*, C. K. Allen's *Law in the Making*, and Cardozo's *Nature of the Judicial Process*.

Relevance of International Law.—In the attempt to fit principles and rules to the relations of governments, in recognition of the factors introduced by their special nature and responsibilities as compared with individuals, international law may become relevant. It is, of course, itself very largely—some have thought too largely—the product of an adaptation of principles and rules of private law to the international relation, and the statute of the Permanent Court of International Justice now specifies the general principles of law recognized by civilized nations as a part of the material for decision.[6] Municipal courts, in the course of administering justice between man and man, may find it necessary to take account of public international law, just as it may be necessary through private international law to have direct recourse to some foreign law. Without entering upon the meanings or theory of the brocard " International law is a part of the law of England "[7] or whether, like another famous phrase, it is rhetoric and not law, it is clear that questions may arise in litigation that cannot be disposed of without reference to the situation in international law.[1] Where the question is one of the limits of national jurisdiction, international law, at any rate as accepted and interpreted by the national authorities, may be significant and material in national courts.[2] One probable result of a permanent international court is that its doctrines and decisions will be added to the evidence not merely of international law, but of the principles and rules generally accepted as law whether for public or private relations. In a jurisdiction like that of the High Court of Australia or the Supreme Court of Canada, the search for the appropriate rule for the decision of cases between governments, the departures from or adaptation of the rule of individuals must increase the occasions when recourse must be had to international law, not as authority in any formal sense, still less as a different regime superseding the national law, but as material from which enlightenment and assistance may be gained as to the principles held for law where relations are those of political communities, and therefore relevant to the ascertainment of the national law appropriate to the situation of the parties before the court. The weight of relevant factors which have no predetermined authority cannot, of course, be standardized; but it is increased in proportion to similarity in circumstances, and therefore the practice in other federal systems and the reasons on which it is founded will have a special value.

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[1] Cf. *A.-G. for New South Wales* v. *Brewery Employees Union*, (1908) 6 C.L.R. 469, 557–8—Isaacs J. ; *South Australia* v. *Victoria*, (1911) 12 C.L.R. 667.

[2] *Commonwealth* v. *Queensland*, (1920) 29 C.L.R. 1 ; *State of Tasmania* v. *State of Victoria*, (1935) Argus L.R. 157.

[3] (1907) 39 S.C.R. 14, 44.

[4] *Wyoming* v. *Colorado*, (1921) 259 U.S. 419.

[5] Cf. *Connecticut* v. *Massachusetts*, (1931) 282 U.S. 660. *New Jersey* v. *New York*, 283 U.S. 336.

[6] For illustrations of recourse by the Permanent Court of International Justice to accepted principles of law common to national and international courts, " general conceptions of law," see Lauterpacht, *Development of International Law*, pp. 82–3.

[7] Cf. Triepel, *Droit international et droit interne*, pp. 132 *seq.*, *Grotius Society's Publications*, vol. x, pp. 131 *seq.* See also *Journ. Comp. Leg.* (1931), vol. xiii, pt. i, p. 133 ; Picciotto, " The Relation of International Law to the Law of England and of the United States, " *Am. Journal of Int. Law* (1932), vol. xxvi, p. 260.

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[1] E.g. *Commercial and Estates Coy.* v. *Board of Trade*, [1925] 1 K.B. 271 (right of angary).

[2] Cf. the various judgments in *R.* v. *Keyn*, (1876) L.R. 2 Ex. Div. 62; *Croft* v. *Dunphy*, [1933] A.C. 156, 162; *in re Piracy jure gentium*, [1934] A.C. 586.

In the Labrador case (*Re Boundary between Canada and Newfoundland in Labrador Peninsula*, (1927) 137 L.T. 187), the question on the Special Reference fell to be determined under Statutes, Orders in Council and Proclamations, and turned largely on the meaning of the term *coast* or *coasts* used therein. Newfoundland argued that the limit of inland territory within the term was to be found in the watershed of the rivers falling into the sea. The Privy Council in recognizing the relevance and weight of this argument pointed out that it was consistent with the doctrine of international law by which the occupation of a sea coast carries with it a right to the whole territory drained into the rivers which empty their waters into its line, and cited Hall, Westlake and Lawrence (p. 194). In *A.-G. for British Columbia* v. *A.-G. for Canada*, [1914] A.C. 152, and *A.-G. for Canada* v. *A.-G. for Quebec*, [1921] 1 A.C. 413, the Privy Council declined in an appeal from Canadian courts on questions submitted by the governments to answer questions as to the property in the bed of the sea from low water to the three-mile limit. Apart from the fact that sea fisheries were not an incident of property, the question of the nature of the power and right of a country in the marginal waters was one of international law and not of municipal law alone, and it would be improper in a controversy of a purely municipal character to express an opinion on such a disputed subject. It will be noted, first, that this was not a *lis*, but what would now be called a case of advisory opinion, in which the court may for sufficient reason refuse to answer the questions submitted to it. Secondly, the question raised international issues affecting the relations of the Crown and foreign countries, in the waters themselves; it was not the invocation of international law for the determination of some matter between Dominion and Province which, however decided, has no relation to external countries.

Law and Justice.—The place of moral grounds in a judicial system is not a question peculiar to any one department of law, but it is liable to become prominent in proportion as the law is not contained in " crystallized propositions " [1] of definite application. Discussions are well-worn and need not be repeated. That moral principles, expediency or " justice " are no reason for setting aside or refusing to apply a settled rule of law where the facts of the case fall within the scope of the rule; that, on the other hand, the same considerations may be very cogent as to the extent and scope of the rule itself where that is doubtful; that where the law is doubtful a result is to be preferred which will accord with accepted views of justice, morality and public interest than one that would offend them; that in the face of a result leading to manifest injustice the courts will strive to extend to the case a beneficent principle or rule which will prevent that result; that much of the law still lies within the reasons for it—its " principle "—so that its formulation or expression is provisional, liable to be tested by those reasons in application to particular facts and to be revised extensively or restrictively,—all this will be conceded. It will be conceded also that often there is room for difference of opinion as to what is principle and what is positive rule of law, as to what is flexible and what is rigid, as to whether the state of the law permits you to go ahead in the name of development or adaptation and give effect to morality, expediency or justice, or sets up a barrier beyond which the courts may not pass. No court is free of the difficulties thus presented, and no reiteration of precepts or protests will remove them. When in *A.-G. for Quebec* v. *A.-G. for Ontario* [2] the Privy Council rejected the moral standard, it did no more than affirm that where there was a rule of law applicable to the facts of the case, no opinion or conviction that that rule did not meet the justice of the case could justify a court in ignoring the rule or modifying it; the position so often affirmed by the Board in the case of statutes is the same in the case of other established and settled rules. But it could not be meant to affirm that the court in Canada or the Privy Council itself had anything less than the ordinary freedom of a court in the ascertainment and determination of the law.

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[1] The expression used by Lord Haldane in *Rodriquez* v. *Speyer*, [1919] A.C. 59, 77.

[2] [1910] A.C. 637.

ADMINISTRATIVE AUTHORITIES AND THE COURTS.

[*Contributed by* W. Ivor Jennings, Esq.]

Buried in the pages of the *Committee Hansard* is a very interesting discussion on the exercise of appellate powers from local authorities.[1] It deals with a single question only, whether appeals from clearance orders made by local authorities under s. 2 of the Housing Act, 1930, should go to the county courts or to the Minister of Health. The Committee spent several hours in discussing whether the existing law, whereby appeals go to the Minister, should be maintained, and finally decided, in accordance with the recommendations of the Minister, that no change should be made. This is one example only of a very pressing problem, covering not only the question of appeals, but also the wider question of the judicial control of public authorities. It is a problem for which different systems of law have provided different solutions, and no adequate comparative survey has yet been made. Two recent French books have, however, provided material on some aspects of the problem. M. Andréadès, in his *Le Contentieux administratif des Etats modernes*,[2] has covered a wide field, and has exhibited, with some inaccuracies and some omissions, the state of the law on this point in a considerable number of legal systems. Professor Roger Bonnard in *Le Contrôle Juridictionnel de l'Administration*[3] has dealt with the subject in a more systematic manner.

An examination of Professor Bonnard's approach may perhaps assist in exhibiting the nature of the problem. At the outset, naturally, he is concerned with the theory of the separation of powers. Carré de Malberg, as is well known, denied that there was any material difference between administrative and judicial functions.[4] Professor Bonnard accepts the more traditional theory. Since there is a formal difference there must be a material difference. It is desired to make a distinction of form, that is, of exercise, because the functions are in fact different. The function of jurisdiction is the determination of differences, and there are three elements necessary to its existence : (*a*) there must be a dispute in existence ; (*b*) jurisdiction is taken at the suit of a party to the dispute ; and (*c*) the deciding authority determines the dispute by a special act having two parts, namely, (i) a statement of the facts, and (ii) a decision.

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[1] Parliamentary Debates: House of Commons. Standing Committee A: Housing Bill. Official Report, cols. 637–68.

[2] *Le Contentieux administratif des Etats modernes*, par Stratis Andréadès. (Paris: Sirey, 1934.) 587 pp.

[3] *Le Contrôle Juridictionnel de l'Administration*, par Roger Bonnard. (Paris: Delagrave, 1934.) 266 pp.

[4] Carré de Malberg, *Théorie générale de l'Etat*, i, p. 691 *et seq.* Since Professor Jenks, in his review of my *Law and the Constitution* in the *Journ. Comp. Leg.*, 3rd Series, vol. xvi, p. 317, appears to assume that my denial of Montesquieu is a personal heresy in some way influenced by "left-wing" tendencies, perhaps this is the place to acknowledge my overwhelming debt to Carré de Malberg and to other French writers who have examined the theory of the separation of powers *au fond*.

Duguit and others assert that a dispute is not essential, as, for instance, in a *recours pour excès de pouvoir* (or, to use the nearest English equivalent, on a writ of certiorari to quash). But, says Professor Bonnard, it is not necessary that there be two *parties* before the court, provided that there is a dispute. Many systems of law do in fact provide for two parties to litigation, by requiring a department to be made a party, or providing for a person (*e.g.* the Attorney-General in England) to represent the public interest. The essential thing is that there should be some contest over rights or powers.

Administrative disputes are not, however, limited to disputes dealt with by administrative courts ; they include also disputes dealt with by the ordinary courts. There are two methods by which the line between civil disputes and administrative disputes may be demarcated. The one method is to define as administrative a dispute in which part of the administration is concerned. Such a definition would include disputes in which local authorities were concerned, but not disputes in which concessionaries and others not acting as public authorities were concerned. The other method is to distinguish between public and private law, so that a dispute is administrative if it arises out of administrative law, but is not administrative, even if the administration is implicated, if it arises out of civil law.

But an administrative dispute must be a dispute on a matter of law (elsewhere in the volume Professor Bonnard objects to the numerous cases in English administrative law where the courts have power to determine whether the action of an administrative authority is *reasonable*). Hence administrative jurisdiction is always declaratory of law, and the decision on the facts is ancillary to the declaration of law.[1] But a declaration of law means a declaration of right, and this leads to a consideration of the nature of rights and the distinction, if such concepts are logically possible, between rights according to private law and according to public law. It leads also to a consideration of the nature of the " legal personality " of the State or of the public authority which is a party to the dispute. It is not necessary to follow out Professor Bonnard's arguments on these points, though it should be said that they are closely argued, and that the author is evidently familiar with the vast literature in which the problems are discussed. It is enough to say that he considers that the discretionary powers of the administration sharply distinguish the system of rights in administrative law from the system of rights in private law.

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[1] It may, of course, be strongly argued that this is equally true of private law. Cf. Borchard, *Declaratory Judgments*, c. i.

The second part of the book is concerned with the methods of administrative jurisdiction. There are three possibilities. First, the jurisdiction may be exercised by some organ of the administration itself, which is spoken of as an "administrator-judge." Secondly, the jurisdiction may be exercised by the civil courts. Thirdly, it may be exercised by administrative courts. The modern tendency (as exhibited by the survey of present practice made in a later section of the book) is to eliminate the administrator-judge and to limit the jurisdiction of the ordinary tribunals, since it has been found possible (*pace* Dicey, as an English lawyer might say) to make administrative judges "real judges."

The existence of the administrator-judge is due historically to (1) the doctrine of the separation of powers, which regarded interference by judges in matters of policy as undesirable, (2) the assumption that since one party is the State, it is essential that the State should judge, and (3) the ability of the administrator and the inability of the judge to understand the technical issues involved. Perhaps it will be well to let Professor Bonnard put this last point in his own way, for the same argument leads, as we shall see, to the case for the administrative court.

> In favour of the administrator-judge [he says [1]] has been put the technical character of the questions raised by administrative jurisdiction. It is frequently necessary in respect of such legislation to understand the working of public services. But the administrator can better appreciate such questions of administrative technique than a judge whose office is distinct from the administration.
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> This argument has some value where the judge charged with administrative proceedings is an ordinary judge, who is ordinarily concerned with proceedings between private individuals. But the argument loses much of its value . . . when the judge of administrative proceedings is a specialist in such matters who has maintained some contact with the administration. Such a judge can be perfectly familiar with administrative technique and accordingly can judge administrative proceedings effectively.

But the fundamental argument of the case against the administrator-judge is that he is a judge in his own cause, or at least that he is biased in favour of the administration. For this reason there has been a tendency (very marked in England, as we may add [2]) to separate this administrator-judge from the administration more or less definitely so as to create what in England would be called *ad hoc* administrative tribunals.

What, then, of the civil courts? Given that certain questions at least (though Professor Bonnard states the case more nearly absolutely) ought to be decided by judges, why not the ordinary courts? The following arguments are put in their favour: (1) The civil courts alone are capable of protecting the individual. They are created for this purpose. They have the necessary authority, and they follow the necessary procedure. (2) The doctrine of the separation of powers demands that the judicial powers shall be exercised by the judicial authorities. For this is in itself a specialization of function. Moreover, the system of "checks and balances" demands that the civil courts limit the autonomy of the administration.

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[1] P. 101.

[2] See Robson, *Justice and Administrative Law.*

Against these arguments must be placed others which produce the contrary conclusion: (1) It has been said that civil courts are frequently prejudiced against the administration, and even that they are deliberately hostile. If this is so, they tend to interfere with the smooth working of government, and therefore offend against the principle of the separation of powers. (2) Administrative jurisdiction involves specialized knowledge which the ordinary judges do not possess. (3) New administrative legislation frequently creates a mass of litigation which the ordinary courts are incapable of dealing with rapidly. (4) Finally, the notion that the civil courts are alone independent and capable of protecting the individual has disappeared. It is merely a matter of organization to secure that administrative courts shall be as free and as careful of private rights as the civil courts.

Professor Bonnard proceeds to consider the various kinds of powers which have been given to administrative tribunals, the conditions under which true judicial independence is possible, and similar questions. Moreover, in the second half of the book he considers the various solutions which the different legal systems have adopted. It would take too long to summarize the results of this analysis, though it may be said that it exhibits a clear tendency to separate administrative and civil jurisdiction. Moreover, a mere analysis of law is not enough. Comparative law is of no value unless the consequences of differences in legal technique are made plain. Goodnow's *Comparative Administrative Law* is the best of all books on the subject, but it does not really tell us how the systems which he describes operate in relation to the individual citizen. We must concern ourselves, therefore, with principles rather than with details, and apply principles to systems with which we really are familiar, since then we can estimate the consequences of their adoption. Consequently, while tribute must be paid to the vast learning and great power of analysis shown by Professor Bonnard in the second half of his book, it is more germane to our present purpose to consider more critically the general argument developed in the first half.

It must be said at the outset that I am quite unconvinced by Professor Bonnard's distinction between administrative and judicial functions. A distinction of form or of procedure is not a distinction of substance. His analysis of the judicial function set out above is of much the same nature as the analysis made by the *Committee on Ministers' Powers*.[1] It tells us *how* a judge exercises his functions. If, therefore, any function whatever is given to a judge he will exercise that function in that way, and the function will become a "judicial function." In other words, a function is judicial, according to this argument, because it is given to a judge to exercise according to his methods ; and this is to say that a model yacht is a piece of furniture if it is made by a cabinet-maker with his own tools. The purpose of the distinction, if it can be drawn, is to distinguish between the things done, not between the persons who do the things and the methods which they choose to adopt. Or, looking at the matter from the point of view of the legislature, the distinction ought to enable the draftsman immediately to determine whether he should allot a new function to a court or to an administrator.

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[1] Cmd. 4060/1932, p. 73; for a criticism on these lines, see Jennings, "The Report on Ministers' Powers," *Public Administration*, vol. x, p. 344.

In fact, however, the matter is by no means so simple. The functions at present performed by courts are not all of the same nature. There is, for instance, but a single common element in the function of a Divisional Court determining a point of law on a case stated and the function of a court of summary jurisdiction. That common element is the interpretation of rules of law and their application to a set of facts. Similarly, there is little in common between a decision of a Public Assistance Committee to use beds of a certain manufacture in its institution and the decision of the same committee to give Mrs. Brown thirty shillings a week poor relief.

The functions which are sought to be compared are, however, those in which the interests of an individual are being affected. Here, whether the function is that of determining the consequences of a criminal act, or the civil consequences of a breach of law, or the consequences of some state of facts giving rise to an "administrative" claim, the complete function almost invariably contains three elements : (1) a determination of the relevant facts, (2) an interpretation and application of the law and (3) an exercise of a discretion. Lawyers tend to forget the third element, partly because they usually have their eyes on the function of the superior courts, where it is least important (or even, as in the case of a conviction for murder, non-existent), and partly because in most cases in the courts, as in the infliction of punishment or the assessment of damages, they do not give that attention to the exercise of the discretion which its importance deserves. Yet in the great majority of cases in the inferior courts the facts are not disputed, the law is clear, and the essential function is the exercise of the discretion. Its importance is not so great in civil cases as in criminal cases. But even in ordinary common law cases there is a choice of remedies ; and even where damages have to be given they have to be assessed. Moreover, this is one only of the functions of the civil courts. In bankruptcy cases, the administration of wills and trusts, the care of wards of court, the administration of divorce law, and in many other cases which will occur to the lawyer who lives outside the Temple, the element of discretion is largely predominant.

On the other hand, it is quite impossible for any "administrative" authority to take a decision in an individual case, such as the grant of poor relief, the grant of social insurance benefit, the acquisition of land, the demolition of insanitary property, the making of a clearance order, or the making of a declaration that a piece of land is to be a "private open space," without ascertaining the facts relevant to the question. Moreover, since all administrative authorities have their functions strictly defined by law, especially where they affect the interests of individuals, it is quite impossible for them to take any decision without considering the law. Just as the clerk to justices need not intervene in every case to advise the justices in legal issues, so it is not necessary for the clerk to the local authority or other legal adviser to intervene in every case. But to take extreme cases, there is a greater legal element in the making of a draft demolition order by a local authority than there is in the exercise of the ordinary matrimonial jurisdiction of justices.

Thus in respect of the substance of the functions, it is not possible to distinguish the functions performed by courts and by administrative authorities in England, nor, so far as my knowledge goes, in any other country. Nor is it possible precisely to distinguish the forms or methods. It is wrong to assume that there is a single judicial method or a single administrative method. In the courts of summary jurisdiction, for example, there has lately been a good deal of experimentation. Though criminal lawyers tend to think of criminal justice in terms of indictable offences, they really know little of the judicial process if they are not familiar with children's courts, probation officers, court missionaries, reports from education authorities, police discretion and the like. It is true that the conservatism of lawyers and the strictness of the law of procedure have made the administration of civil justice in England comparatively uniform. But one cannot say that there is much relation between the forms of the King's Bench Division in running-down cases and the forms of the Chancery Division in bankruptcy cases or in the administration of trust estates or in the care of wards of court. Moreover, it is trite observation that judicial procedure is not the same in all the jurisdictions of the world.

On the "administrative" side, the variety of forms is even greater. Possibly I may not use the examples of courts of referees, appeal tribunals under the Unemployment Assistance Acts, or even arbitrators under the Lands Clauses Acts, since some will say that these are "judicial" bodies. But presumably insurance officers under the Unemployment Insurance Act and determining officers under the Unemployment Assistance Acts will be regarded as "administrators"; and it may be pointed out that under Rules of Court it is possible for a High Court judge to follow their procedure almost exactly. But for a few slight though significant differences, the procedure of a guardians committee administering transitional benefit between 1931 and 1934 was the same as the procedure of a court of summary jurisdiction in the exercise of most of its jurisdiction. At the other extreme there are, of course, examples of "administrative" process in relation to individuals which cannot be compared with "judicial" process.

It seems, therefore, that it is not even possible to draw precise distinctions of *form*. The State has established a variety of different bodies administering different services, whether called "judicial" or "administrative," in a variety of ways. Even in respect of *personnel* a precise distinction cannot be drawn. In most countries it is possible to distinguish between functions exercised by lawyers as such and functions not exercised by lawyers as such (though in some countries most "administrators" have a legal qualification). In England that distinction cannot be drawn. For justices of the peace are, generally, not lawyers.

The conclusion is that the simple dichotomy of "judicial" and "administrative" is not adequate, either in respect of the nature of the function, or in respect of the nature of the procedure, or in respect of the *personnel* exercising the function. There is a considerable variety of functions—increasing in number as the functions of the State increase—exercised by a variety of bodies in a variety of ways. When a new function is created, the draftsman has to ask himself whether the composition and procedure of an existing body is adequate to the task; if he considers that there is no such body, he has to provide for a new body and to determine its procedure. For instance, if the most important questions likely to be raised are questions of legal interpretation, he may decide that the function should be exercised by the High Court. This is especially the case with appellate functions. But the High Court may not be an appropriate body because its process is expensive. For instance, a right of appeal to the High Court from the decision of an insurance officer would be practically useless except to members of trade unions. Accordingly, it might be considered desirable to establish an *ad hoc* tribunal of lawyers. In fact, in this example, courts of referees composed in a peculiar manner were set up. If, to take another example, the function to be exercised would involve the imprisonment of individuals, it might be decided to give the function to those bodies which already deal with similar cases, *i.e.* the criminal courts. But if the persons to be imprisoned were lunatics, who had to be confined not because of their own fault, but because their disability made protection essential, the first task of the authority would be to determine a medical question. Whatever authority is chosen, the primary responsibility must fall on medical advisers, though for the protection of individuals it might be necessary that quite independent persons, such as justices of the peace, should have the last word. To take one last example, the question whether A's land is the most suitable for a school is primarily a question for the local education authority. In order to create a national minimum standard it might be necessary to insist upon the assent of the Board of Education. But since the local authority and the Board of Education are interested in keeping down the cost of education, it might be necessary to provide some other tribunal for assessing compensation. The question which is then raised is whether a civil judge entirely ignorant of land values (but capable of acting on expert opinion), or an administrative judge experienced in this type of jurisdiction, or a surveyor who has given special consideration to land values and who acts as an arbitrator, is the appropriate authority.

Such allocations of functions would be made, it must be emphasized, not because there is a distinction between "administrative" and "judicial" functions, but because it is considered that a person possessing certain qualifications and acting in a certain way is the most competent to exercise the particular function in question. One person is an expert in private law (or, strictly speaking, in some of its branches), who by constitutional devices and professional tradition occupies an independent position, and who acts according to the dilatory, expensive and formal, but for many purposes effective, procedure laid down in Rules of Court and the law of evidence. Another person is an expert on education, who does not act except in the presence and with the advice of an expert in the law of education, whose procedure is almost entirely formless, but frequently rapid and always inexpensive, but who is concerned primarily with the advancement of education, and not with the protection of the rights of property owners. So it is with the other experts. Sometimes new experts have to be created (*e.g.* chairmen of courts of referees). Sometimes existing experts are ordered to act according to a new procedure. Sometimes existing experts may act in accordance with the procedure used for their existing functions.

But the law of jurisdiction must not be made too complicated, partly because anything which adds to the present complication tends further to denial of justice, and partly because economy insists that any administrator, judicial or otherwise, shall be fully occupied. One advantage of what Professor Bonnard calls the "administrator-judge" is that he is normally concerned with a question from the beginning. The individual puts his case, if he has the opportunity, to him. His process is simple and inexpensive. There is, of course, another type of administrator-judge, which Professor Bonnard does not mention. That is the central official or minister who is quite impartial so far as the individual is concerned. Here the question is not so simple as Professor Bonnard makes it. If the essence of the jurisdiction is the exercise of a discretion, whether it is a function like the punishment of offenders or a function like the control of housing accommodation, there ought to be some general standards with regard to its exercise. Since such standards vary from age to age, and since it is considered that they ought so to vary, it may not be desirable to lay down such standards in legislation. Such standards can be maintained where a central authority has some control, either by way of appeal or because approval of the local authority's action (including, of course, local "judicial" authority) is required. On the other hand, if the central authority is itself concerned to promote the policy of the local authority, it is not "impartial" in the true sense. Moreover, it is essential, as we are constantly reminded, not only that justice should be done, but also that it should appear to be done.

Simplicity and economy are maintained in regard to what are for the time being "judicial" functions by giving the civil and criminal courts a large variety of essentially different functions and by integrating their activities in a single judicial system. The real case for the administrative court is, as Professor Bonnard points out, that administrative law deals with questions quite distinct from the questions raised by civil and criminal law, and that knowledge of the problems of administration (in the narrower sense) and of administrative technique is essential. It would take too much space to prove this statement in regard to England, so perhaps it may be taken as a mere assertion, supported, however, by the experience of three-quarters of the world. Jurisdiction is given to an administrative court because, on the one hand, *expertise* is required, and on the other hand because independence and impartiality are required. It should perhaps be added, for the benefit of those whose notions of administrative jurisdiction derive from Dicey, that in most States administrative courts are as independent and as impartial as the civil courts.

We have, in fact, found in England that even when independence and impartiality are required, it is not always possible to give the function to the civil courts. This explains the development of the *ad hoc* tribunals. Since every Parliament, whatever its political complexion, keeps adding substantial chunks to administrative law, the question which we have to ask ourselves is whether we are prepared for a vast heterogeneous system of *ad hoc* administrative tribunals, or whether it is not preferable to establish a complete system of administrative tribunals to whom new functions could be given.

If it is considered that the better plan is to establish a co-ordinated set of tribunals under the English equivalent of *Conseil d'Etat* (need it be said again that the *Conseil d'Etat* is as independent as and, for reasons which need not now be explained, more efficient than the *Cour de Cassation* ?), it is not necessary to follow the French example. The historical reason for the French system is, as Professor Bonnard points out, a particular conception of the theory of the separation of powers. We should do well, I think, to avoid conflicts of jurisdiction, and therefore the setting up of a *Tribunal des Conflits*. Though Professor Bonnard says something on this point, he has not convinced me that all conflicts are not inherently objectionable and should not be avoided if possible. I see no reason why administrative courts should not be as integrally associated with the civil courts as the Chancery Division, the Commercial Court (provided that expert judges really are nominated) or the Revenue Court (provided, again, that the personnel is not formed simply by transferring common law judges).

The only difficulty of this suggestion is that it does not provide, as many administrative lawyers would desire, for alterations in the substance of the law. Among the many advantages of the *Conseil d'Etat* is that it had not to found its decisions on the Civil Code. It is not my purpose to criticize that Code, but many French lawyers consider that it needs revision in the light of the social and economic changes of a century and a quarter. The *jurisprudence* of the *Conseil d'Etat* is of more modern creation and, being *jurisprudence* and not a system of binding precedents, it keeps fairly closely to the social environment. Some parts of English administrative law are far more antiquated than the French Civil Code. The obvious example is the law of proceedings against the Crown. Moreover, the common law rules of interpretation assume that all statutes are a derogation from a hypothetically perfect common law, and they have been used lately, in spite of Lord Haldane's warning in *Local Government Board* v. *Arlidge*,[1] to cut down the powers of administrative authorities in the interests of landlords. It is futile for an administrative court to begin with the assumption that large sections of administrative law are pernicious. I think, however, that it would not do so. The rules of interpretation in England are, in fact, mutually contradictory; and an administrative court with none of the common lawyer's bias against administrative law would ignore the eighteenth-century rule that statute law is a derogation from the common law, and would emphasize the seventeenth-century rule (still a part of the law of interpretation) that statutes are intended to remove evils in the common law. For the rest, some statutory modifications would be necessary; and apparently not even the common lawyers assert that the common law of proceedings against the Crown is the height of wisdom.

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[1] [1915] A.C. 120.

INDIAN AND FAR EASTERN CASES ON THE CONFLICT OF LAWS, 1934.

[*Contributed by* S. VESEY FITZGERALD, ESQ, LL.D.]

IT is hoped to make a note on such cases a regular biennial feature of this *Journal* in future. The last article on the subject appeared in 1934,[1] and contained the cases for the preceding six years, to which the following should be added.

Marriage—Conflict of Laws.—*Karan Singh* v. *Emperor*, (1933) 145 I C. 156. A Muhammadan marriage is dissolved immediately on one of the parties thereto renouncing the faith of Islam. So where a Muhammadan married woman renounces her religion and is *then* taken away by other persons they cannot be guilty under s. 487 I P.C. of " enticing a married woman." (Young J.)

Sed quaere, *e.g.* if they entice her to change her religion and go? Surely the vital question is, what was her religion when the enticing commenced?

It should also be noted (*a*) that the decision in *Jones* v. *Titli*[2] has been reversed in appeal,[3] the learned judges who heard the appeal (Sulaiman C.J. and Mukerji J.) differing from their brother on the original side on every point: (*b*) that in *Gourgopal De Sirkar* v. *Kamalkalika*[4] the court disregarded the *obiter dictum* of Lord Thankerton in *Anantapadmanabhaswami's* case and adhered to the view of the nature of an attachment order in India expressed by Bhashyam Ayyengar J. in the lower court in that case, a view which is in accord with universal practice in India and with several Full Bench decisions: (*c*) that the decision in *Shea Tahal* v. *Binaik*[5] has been followed in *Narappa* v. *Govindaraja*.[6] In this case it was admitted that the decree of the foreign court (Travancore) could only be executed in British India if the defendant had submitted to the Travancore jurisdiction. The fact that he took time before the executing court to get an *ex parte* decree set aside and applied unsuccessfully to the Travancore court for that purpose was held not to be such a submission.

CASES FOR 1934.

Inter-religious Marriage.—By far the most important case of the year has been *Khambatta* v. *Khambatta*, of which the original decision given in 1933 was published in unofficial law reports (1934) 36 Bom L.R. 11 A.I.R. 1934, Bom 93, 149 1 C. 1233, and the original and appellate decisions have now been published in (1935) 59 B. 279, the official report. A Scotswoman, Jessie, in 1906 went through a form of marriage before a registrar of marriages in Edinburgh with Ghulam, a Muslim of Indian domicile.[1] Shortly afterwards, husband and wife proceeded to India which, as the marriage was unquestionably valid, became the domicile of the wife, being the matrimonial domicile.[2]

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[1] Third Series, vol. xvi, pt. i, p. 116.

[2] (1933) 55 A. 185.

[3] (1934) 56 A. 428.

[4] (1934) 61 C. 340.

[5] (1931) 53 A. 747.

[6] (1934) 67 M.L.J.R. 187.

In 1912, the wife was converted to Islam. In June 1922, after a married life of nearly sixteen years, the husband divorced his wife by a *talaq*, that is to say by a unilateral repudiation as a matter of his mere authority without the intervention of a court. Such a repudiation, no matter how capricious it may be, is valid in Muhammadan law.

In the following year the wife, desiring to marry again, sued in the district court of Secunderabad for a declaration that she was validly divorced, and this declaration she obtained; but under s. 43 of the Specific Relief Act it had not the effect of a judgment *in rem*. A fortnight later she married Khambatta under the Special Marriage Act, 1872. In order to do, both parties must have made a declaration that they did not profess any of the known historic religions: *inter alia*, the bride repudiated both the Christianity of her upbringing and the Muhammadan faith which she had professed for over ten years and the husband repudiated the Zoroastrian religion to which he had formerly belonged. A marriage under this Act is governed by the principles governing Christian marriage, and divorce from it can only be obtained under the Indian Divorce Act. In 1933, the wife petitioned for divorce from her second husband, Khambatta, on the ground of his adultery and cruelty; in defence, he raised the preliminary issue that there was no lawful marriage between them, since the first marriage of the wife, having been celebrated in Scotland, could not be dissolved except by judicial process, *talaq* having no effect on such a marriage. This plea, of course, is based on the well-known case of *R.* v. *Superintendent Registrar of Marriages for Hammersmith, exparte Mir Anwaruddin.*[3] It has always been extremely doubtful how far that case would be followed in India, and it cannot be said that the doubt is altogether cleared up by the three extremely interesting judgments which were given.

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[1] Muhammadan law recognizes the validity of marriage between a Muslim man and a Christian woman, and the essential ceremonies of marriage in Islam—declaration *per verba de præsenti* before two witnesses—are identical with those of marriage before a registrar. In neither case is there any attempt to define (as in a religious service) the word "marriage" or the duties of the spouses.

[2] It may be noticed that there was some uncertainty whether the domicile was in British India or in the cantonment of Secunderabad, which is part of the Nizam's dominions. This doubt was treated as unimportant, since the law of Secunderabad on the points in issue, though deriving its validity from a different sovereign, is identical in substance with that of British India; and in either case, the Bombay High Court had jurisdiction.

[3] [1917] 1 K.B. 634.

The case was heard as an original suit by the Chief Justice (Beaumont C.J.); the appeal was decided by Blackwell and Broomfield JJ. All three judges of course recognized that the question of the validity of the *talaq* in the United Kingdom was not for them to decide; and that accordingly the decision must be accepted as a correct statement of the law of England. They also held unanimously that, whatever may have been the previous position, the wife became subject to Muhammadan law and the marriage accordingly liable to be dissolved by *talaq* from the moment that she adopted Islam. This view is clearly in agreement with that of Lord Reading C.J., who said in the Hammersmith case that the wife in such a marriage acquires her husband's domicile but "does not acquire her husband's religion nor become subject to the laws of his religion *except insofar as they are the law of his domicile and then to that extent only*."[1] The two learned judges who heard the appeal appear to have thought that their decision was also reconcilable with the views of the other judges in the Hammersmith case and with the hard and fast distinction established in English law by *Hyde* v. *Hyde* between monogamous and so-called polygamous marriage. In the words of Swinfen Eady L.J. such a marriage "was not a marriage in the Muhammadan sense which could be dissolved in the Muhammadan manner." But, if that is so in spite of the religion and personal law of the husband, how can the case be affected by the mere conversion of the wife?[2]

Lord Reading, in the words above-quoted, had shown an inkling of the real difficulty of the case, and there can be no question that, were such a case to arise in a purely Muhammadan country—in Egypt, for example, or Persia—the Muhammadan law would be applied, because it is the sole law provided by the legal system of the matrimonial domicile capable of being applied to the marriage of a Muslim. This, Beaumont C.J. held, was also the case in India. There is no general law of marriage applicable to all classes in India (whether British India or native states); there are marriages under the laws of various religions; and there is civil marriage under the Special Marriage Acts, 1872 and 1923, which are only available to a very limited class of persons, not including Muslims or Christians. The Chief Justice therefore held that he must apply the Muhammadan law, because it was the only one which the matrimonial domicile provided capable of being applied to the case. He went on to hold that:

> Once it has been established that a man and woman have entered into a valid marriage contract, that is, have contracted to become husband and wife, it is for the courts of the country in which they elect to make their home, and not for the courts of the country in which they may chance to have been married, to determine the status which attaches to the marriage and the rights which flow therefrom. If the courts of the domicile allow to the hus-

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[1] The italics are mine.—S. V. FG.

[2] Blackwell J. expressly denied Swinfen Eady L.J.'s proposition, though Broomfield L.J. based himself upon Darling J.'s somewhat similar pronouncement.

band more than one wife, and the right to divorce any wife at his pleasure, and if the courts of the country where the contract was made do not recognize as marriage any union but that of one man to one woman to the exclusion of all others, then the logical result must be that the contract has conferred upon the parties the status of marriage in their own country but not in the country where the marriage took place : not that the parties have acquired the status of marriage and the rights incidental thereto under the law of the latter country to which as married persons they have never been subject.

He would treat the question of monogamy or polygamy and the question of the methods open for divorce [1] purely as incidents of the status determinable by the law of the matrimonial domicile.

Two other passages in his judgment illustrate this point of view very clearly.

> To hold from the mere fact that a marriage has taken place in the country of the wife and according to the forms required by the law of that country that an inference arose that the parties intended that the marriage should be of the character recognized by the law of the wife's country irrespective of the domicile of the husband seems to me to amount to a substitution of the *lex loci contractus* for the *lex domicilii*, as the law which is to regulate the status and rights of the parties in such a case. . . .
>
> It has been suggested in the course of the argument that an unfortunate result of this decision will be that a marriage held by this court to have been dissolved will be regarded as still existing by the English courts. That may possibly be so. It is always deplorable when a conflict between different systems of law results in two persons being regarded as husband and wife in one country and as strangers in another. But so long as English law refuses to the law of the domicile the right to determine what manner of union is to be regarded as falling within the institution of marriage, such conflicts would seem to be inevitable.

The appellate judges agreed with the Chief Justice that the wife, being Muslima at the date of the divorce, could be divorced by Muhammadan law, Broomfield J. rightly remarking that this question had to be determined according to the law of the matrimonial domicile by which the wife on such conversion became subject to Muhammadan law. The other questions Blackwell J. expressly refrained from deciding, intimating that had it been necessary he would have taken further time to consider, but showing a leaning to the arguments of Broomfield J. rather than to those of the Chief Justice.

Broomfield J. was prepared to follow the English decisions. " I can find nothing in the judgments of those eminent Judges [Lords Brougham, Campbell and Reading] which goes so far as to justify the inference that they would for a moment have countenanced the idea of a Christian marriage contracted in England or Scotland being treated as a polygamous one in some other part of the world," and he himself enunciated the proposition in the form that " for the purpose of determining the nature of the marriage which results from the contract, the law of the domicile is irrelevant."

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[1] Dr. Cheshire would apparently agree with him as regards divorce, though not as regards polygamy. *See* Cheshire, P.I.N., p. 278.

He went on, however, to find that in respect of divorce, so long as one party remained Christian, the law of the domicile was in fact identical. This proposition was arrived at on a consideration of the Indian Christian Marriage Act, 1872, and the Indian Divorce Act, 1869.

No marriage between the parties could have been celebrated in India save under the Indian Christian Marriage Act, 1872. That Act deals only with the solemnization of marriage, and unlike the Special Marriage Act, 1872, contains no express provision as to the nature or incidents of marriage—the probable reason (as of other difficulties in the Act) being that the Legislature did not wish to rouse religious controversy and preferred to leave the matter to be settled by the courts without its guidance when occasion should arise. A Muslim who is already the husband of one wife may marry a Christian as his second wife by the procedure provided in this Act and may subsequently marry two more wives by Muhammadan law; and, though the Christian wife will have her remedies under ss. 10 and 19 of the Indian Divorce Act, none of these marriages will be bigamous or criminally punishable in any way; nor will they (subject to the right of the Christian wife to sue for nullity *in respect of her own marriage*) even be necessarily void. The subsequent marriages are almost certainly valid.

But so far as the Christian spouse is concerned, nullity or divorce is only obtainable under the Indian Divorce Act, 1869, the principles of which are in the main derived from English law. The learned judge was accordingly prepared to hold that the principles of the English law of Christian marriage governed such a case as this, even though to do so involved holding that the husband who, prior to 1923, was unable to obtain a remedy under the Divorce Act was also deprived—though not by any direct enactment—of the remedy which his personal law allowed.

Nor is the form of a Christian marriage a protection in India against polygamy. This was decided, not for the first time, in *Gurusami* v. *Irulappa*.[1] A Hindu convert to Christianity married a Christian woman according to Christian rites, but subsequently relapsed to Hinduism and married a second wife, a Hindu. It was held that the first marriage did not render the second bigamous or invalid. The parties belonged to one of those curious South Indian communities which fluctuate freely between Christianity and Hinduism; and this fact was not without influence on the decision. Some of the earlier cases lay down the same principle in much wider terms; but the Indian decisions on the point are extraordinarily conflicting.

Sovereignty of Native States.—In *Gaekwar Baroda State Railway* v. *Habib Ullah*, (1933) 56 All 828, 3 A.W.R. 621, A.I.R., (1934) All 740, two judges of the Allahabad High Court laid down the startling and indeed revolutionary theory that the Indian ruling princes are not sovereign princes inasmuch as they are subordinate to the authority of the British Crown and that their privileges are limited by s. 86, Civil Procedure Code. This involves the assumption that the Indian Legislature had power to affect them by legislation, an assumption which begs the question ; it involves a strained reading of s. 86, which was surely intended as an additional safeguard ; and it overlooks the distinction between " territorial sovereignty " and " political control " pointed out by Sir Arthur Wilson in *Hemchand Deochand* v. *Azam Sarkarlal*,[1] not to mention other well-known cases. In view of the feeling of the Indian princes about their sovereign rights, it will be surprising if the case is not taken further.

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[1] 67 M.L.J.R. 389.

Other Cases.—*Rooke* v. *Rooke*, 36 Bom L.R. 492 explains the well-known requisites for jurisdiction in divorce cases and explains the doctrine of domicile. *Dev Samaj Council Lahore* v. *Amritlal Motilal*, 28 S.L.R. 54 A.I.R. 1934 Sind 123, explains the doctrine of equitable jurisdiction where foreign immoveables are concerned. *Panchapikesa* v. *Hussain Mohamed Rowther*, (1934) 66 M.L.J. R. 209, A.I.R. 1934 M. 145, 148 I C. 296, illustrates the fact that a foreign judgment will not be enforced in British India when it proceeds " on an incorrect view of international law and a refusal to recognize the law of British India in a case in which such law was applicable." None of these cases contains anything new, but the situation which arose in the last-named was probably due to the difference between the authority of Moslem law in the Straits Settlements (where as already remarked[2] it is merely supplementary to English law) and its authority in India.

Cases from the Asiatic Colonies and Protectorates are not of much interest. In *Majeeda* v. *Paramanayagam*, (1934) 36 Ceylon New L.R. 196, the age of majority of a Muslim wife had to be considered in reference to three legal systems, Roman-Dutch, Muhammadan and British enacted law. It was held that being under 21 she was a minor for the (English) law of contract ; but that being a married woman who had acted with the assistance of her husband, relief could be sought against her at Roman-Dutch law by way of *restitutio in integrum* on proof of the grounds recognized in that law for that relief. This result, which could not be arrived at by the single application of any one of the three legal systems in question, involves the recognition of a Muhammadan marriage by Roman-Dutch law, a recognition which is inevitable in Ceylon though it would be refused in South Africa.

In re Companies Enactment, 1917, and *In re Huey Yet Tin Dredging Ltd.*, F.M.S.L.R. 1934, p. 286.

A *pratanabhut* is a mining lease granted by the Siamese Government, and Siamese law provides that no mortgage or charge on the same shall be valid unless previously sanctioned by the Royal Department of Mines. No holder shall be allowed to use his *pratanabhut* in whole or part liquidation of a debt, nor shall a *pratanabhut* be attachable in respect of such debt. A *pratanabhut* does not confer right of ownership in England, but only of user subject to Government control. *Pratanabhuts* were, however, transferable on such sanction.

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[1] (1905) 33 I.A.I.

[2] See the previous article in *Journ. Comp. Leg.*, Third Series, vol. xvi, pt. i, at pp. 118, 119.

Held, the courts of the F.M.S. will not attempt to enforce a charge on a *pratanabhut* purported to have been so created by a F.M.S. domiciliary (a company now in liquidation). Cf. *Brown* v. *Gregson*, [1920] A.C., p. 60.

Of the Hong Kong cases, *In re Kishen Das*, (1934) 26, Hong Kong, 42, illustrates the difficulties in which parties of different religions find themselves in India when they wish to marry without abjuring their religion. A Hindu man and a Chinese woman could think of no better expedient than to be married by a Sikh officiant in the Sikh shrine, though neither of them professed or had any intention of professing that religion. The reason for their choice was apparently that the Sikh faith is open to everybody. The marriage was declared void, and it is difficult to be sympathetic since whatever might have been the difficulty in India the law of Hong Kong provides a form of civil marriage to meet such cases. *In re Besa*[1] it was urged (*a*) that the Philippines not having been part of U.S. territory at the time of the Anglo-American Extradition Treaty, offenders charged with having committed offences in them could not be extradited, and (*b*) that the accused not being an American subject could not be extradited. These pleas met with the fate that they deserved.

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[1] (1934) 26 Hong Kong L.R. 35.

[EDITORIAL NOTE.—The article on the Dominion and Colonial Cases on the Conflict of Laws will appear in the February issue of the *Journal*.]

THE "ACCIDENT" IN CONTINENTAL INSURANCE LAW.

[*Contributed by* E. STIEFEL, DR. IUR. (Heidelberg), L. EN DR. (Paris).]

IT is a well-known fact that legislation in matters of insurance law has many common features in Continental statute law. Most of the Continental countries have promulgated special laws for insurance contracts in the last few years. They are all either based on the leading ideas of the Swiss-German Laws of Insurance, or they accept the results of the Latin insurance doctrine as it has been codified in 1930 by the French "Loi sur le contrat d'assurance."

Definition of Accident.—It is a remarkable fact that not a single one of these laws has defined the central term of Accident Insurance, namely the word "accident." For many years past this definition has been left to the police and the courts. It is striking that in spite of the national differences between different systems of jurisprudence the actual findings are closely similar upon such questions. This is true not only when we compare the cases of the different Continental countries, but also when we refer to English case-law.[1]

Most Continental policies contain, in their conditions, a description of what is to be understood by the event insured against in accident insurance. It is, in the typical description, an event (1) involuntary, (2) sudden, (3) external, (4) mechanical, (5) causing bodily injury to the insured.

The following are typical examples of Continental definition of the accident :

France : Est considéré comme accident toute lésion corporelle dont l'assuré est victime, indépendamment de sa volonté par un évènement subit et extérieur agissant mécaniquement sur son corps.

Italy : L'azione causale improvvisa ed immediata, indipendente dalla volontà dell' assicurato, di una forza esterna meccanica causa dei lesioni fisiche.

Germany : Ein Unfall liegt vor, wenn der Versicherte durch ein plötzlich von aussen auf seinen Körper wirkendes Ereignis unfreiwillig eine Gesundheitsbeschädigung erleidet.

Switzerland : Unfall ist die direkte körperverletzende Einwirkung eines von aussen kommenden gewaltsamen Ereignisses, von welchem der Versicherte unfreiwillig und plötzlich betroffen wird.

Austria : Als Unfall gilt jedes vom Willen des Versicherten unabhängige Ereignis, das plötzlich von aussen mechanisch auf den Körper einwirkend, in unmittelbarer Folge dessen Tod oder bleibende oder vorübergehende Invalidität nach sich zieht.

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[1] See Welford, *The Law relative to Accident Insurance*, 1932, c. 10, s. 1.

Czechoslovakia : as Austria.

Holland : Een ongeval in den zin dez er verzerering is jedere gebeurtenis, welke plotseling, van buiten af, en onafhankelijk van den wil van den verzekerde, op diens lichaan inwerkt en daartaan letsel toebringt.

Comparing these with the usual stipulations in English policies we note some differences. In English policies it is assumed that the injury must generally be caused by means which were (*a*) violent, (*b*) accidental, (*c*) external and (*d*) visible.

The following essay will, however, show that the results of the jurisprudence have many identical features and that, if a difficult problem arises in one country, the solution of a similar problem by a foreign court may be helpful.

Defined as Involuntary.—We begin with the central term used in Continental policies, namely "involuntary."

The accident is "involuntary" when the injury is not intentional. A premeditated accident is a contradiction in terms.

The involuntary side of the matter refers only to the harmfulness of the happening and not to its origin. It is quite possible that the happening itself was caused by the will of the insured ; this fact does not in itself exclude an accident, assuming that the injury, the consequence of the event, was not intended, or that the insured had not realized the extent of the consequences.[1] As examples may be cited the acts of jumping off a moving train[2] or lifting a heavy weight.[3] But a person who willingly places himself in extraordinary danger must be considered as accepting the consequences even if he had hoped for the best. The Continental insurance companies have denied liability for injury from a provoked assault or for capital punishment carried out in the normal course of justice.[4]

Defined as Sudden.—An event is sudden when it happens in a relatively short space of time. The condition of speed, combined with that of surprise and inevitability, is essential. On the other hand, the meaning does not include the idea of something out of the ordinary, exceeding the normal and daily round of events. The word "suddenly" has not therefore quite the same function in Continental policies[5] as the word "accidental" in Anglo-American ones: "If in an act which precedes the injury, something unforeseen, unexpected and unusual occurs, then the injury has resulted from accidental means."[1]

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[1] Ehrenzweig, *German, Austrian and Czechoslovakian Insurance Law*, p. 862. Instructive examples given by American cases *Schwartz* v. *Court Traw Murtes*, 229 N.Y.S. 669 : Schwartz picked his nose, causing a hæmorrhage. This resulted in an "ulcer" which produced a perforation of the septum.

[2] Court of Appeal, Hamm, April 25, 1927 : *Review of Insurance Law*, 1927, p. 261. Supreme Court of Czechoslovakia, 1919 : *Cases* (Collection Vážný), Rv. I, 374–19.

[3] Court of Appeal, Dresden, July 14, 1930 : *Review of Insurance Law*, 1931, 77.

[4] Germany : Court of Hamm, April 25, 1927 : *Review of Insurance Law*, 1927, 261. Switzerland : Roelli-Jaeger (Swiss Law of Insurance), Arts. 87–8, Note 13. Schoch, *The Accident in Swiss Insurance Law*, Thesis, Zürich, 1930, pp. 104 *et seq.* Austria : Supreme Court, December 29, 1912 ; *Austrian Journal of Insurance*, 1912, 339. Australia : *Grant* v. *Southern Cross Ass.*, 1928, W.A.L.R. 65.

[5] Court of Appeal, Karlsruhe, February 3, 1932 : *Reports of the German Office for Insurance Control*, 1932, 43.

The sense of the word in ordinary speech is opposed to the idea of treating as an accident a happening which has taken up a comparatively long space of time. Injury to the health incurred in the physical or mental activities of ordinary life cannot therefore be termed an accident. Consequently we cannot approve the decision of the Court of Hamburg[2] which recognized the claim to insurance of a ship's stoker who damaged himself while carrying out his work over an abnormal period (3 hours) with a zeal and energy beyond his physical capacity.

Even if the injury has arisen suddenly it is not necessarily an accident, unless the precipitating cause has arisen suddenly. It is neither necessary nor sufficient that the bodily harm and further consequence of the accident should appear suddenly. The sudden, unexpected appearance of the effect permits of no conclusions as to the cause of the mishap.

Consequently appendicitis caused by the rubbing of a muscle while cycling is not an accident, nor is blood poisoning from the rubbing of a shoe;[3] nor are the bursting of a blood-vessel, a hernia or a strain of the assured's heart a ground for liability when they are caused by physical exertions.[4] But when the effort has only continued for a moment, or for a short time exactly distinguished from that before and after, the injuries caused must be considered as accidents giving rise to liability on the part of the insurer. Injuries from abnormal heat and cold can, but need not, be accidents. They are accidents when the injured has been affected by the extraordinary temperature while engaged in a particular task which takes up a relatively short time (control of furnaces[5]; sunstroke where the exposure is not purposeful[6]; or if, for instance, the insured, while hunting, lost track of the quarry and was caught in a sudden snowstorm).[7] They are not accidents if they are incurred in the course of the ordinary work.

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[1] American leading case: *U.S. Mut. Acc. Ass.* v. *Barry*, 131 U.S. 100. See Cady, *The Law of Insurance*, pp. 220 *et seq.* For the complete jurisprudence see Vance, *Handbook of the Law of Insurance*, pp. 258 *et seq.*

[2] November 9, 1926: *Review of Insurance Law*, 1927, 181.

[3] Germany: Supreme Court, May 10, 1918: *Reports of the German Office for Insurance Control*, 1919, 53. United States: Appeal of Actuary Ins. Co., 83 N.Y.S. 238. Austria: Ehrenzweig, *Insurance Law*, p. 862.

[4] Germany: Supreme Court, October 7, 1921: *Reports of the German Office for Insurance Control*, 1922, 17. Austria: Supreme Court, November 25, 1913: *Austrian Journal of Insurance*, 1914, 190. Great Britain: *Scarr* v. *General Acc. Ass. Court*, (1905) L.J.K.B. 237. Switzerland: Supreme Court, July 5, 1918: *Cases of Swiss Courts on Insurance Law*, iv, No. 242.

[5] Court of Appeal, Basle, October 11, 1912: *Cases of Swiss Courts on Insurance Law*, iii, No. 210. Court of Appeal, Zürich, May 31, 1913: *Ibid.*, iii, No. 211.

[6] Great Britain: *Sinclair* v. *Maritime Pass. Assurance*, (1861) 30 L.J.Q.B. 77. United States: *Gallagher* v. *Fid. a. Cas. Co.*, 148 N.Y.S. No. 6.

[7] *Ashley* v. *Ayriel Ins.*, 217 N.W. 27 (Michigan); contra Austrian Official Commentary to Accident Policies: *Reports of the Ministry, Section for Insurance*, vol. ii, p. 79.

Similarly we must draw distinctions in cases of poisoning and asphyxiation by gas. There can be no question of accidental means when a man is poisoned by gases with which he normally comes in contact in his daily work.[1] The insurer is, however, liable when these gases appear unexpectedly, even if the inhalation has gone on over an appreciable period, and even if the effects have only become apparent some time afterwards. The liability also holds when the insured has suddenly come into an atmosphere full of poisonous gases.[2]

To compare two antithetical cases: A. Death from carbon monoxide poisoning incurred during the daily work in a garage,[3] or while sitting in a car with the windows closed and the engine running.[4] These are not a ground for liability. B. Accidents due to lifting heavy weights do cause liability.[5] But rupture brought on by lifting heavy mail-bags as a part of the usual daily work of a postal employee is not accidental.[6]

In the same way a sudden happening may take place when an activity which was at first slow and meditated becomes, on account of an unexpected obstacle, unpremeditated, instinctive and uncontrollable; *e.g.* physical exertion while untwisting a tight screw.

If, however, the precipitating cause has arisen suddenly it is not necessarily of importance that it should continue effective for a few seconds or for several hours. Death by asphyxiation may have been instantaneous or it may have been the result of inhalation over a very appreciable period of time.[7] In both cases it is accidental if the insured has been suddenly overcome by the gas.

Consequently there is no difference whether or not the injuries have arisen suddenly or whether they have arisen a short or long period after the precipitating cause. Again, it makes little difference whether this causing event itself has been effective only for a moment or not. The term "suddenly" is only a condition of the entrance, of the arising, of the occurrence, but not of the time it lasts nor of its consequences.[8] The suddenness of the cause has nothing to do with the suddenness of the effect.

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[1] France: Supreme Court, July 11, 1933: *Recueil périodique des assurances*, 1933, 353, note Sainctelette. Germany: Court of Berlin, June 11, 1927: *Review of Insurance Law*, 1927, 245. Italy: Trib. Torino, June 26, 1931: *Foro Subalpino*, 1931, 1327 (damage of organism by poisonous gases from a motor-car).

[2] Italy: Court of Appeal, Torino, December 14, 1928: *Foro Subalpino*, 1929, 827. France: Court of Lyon, November 16, 1933: *Recueil périodique des assurances*, 1934, 46. Germany: Supreme Court, June 2, 1911: *Reports of the German Office for Insurance Control*, 1911, 11. Austria: Ehrenzweig, *Insurance Law*, 862; Willer, *Accident Insurance* (*Austria*), p. 3.

[3] Court of Turin, December 14, 1928: *Foro Subalpino*, 1929, 127.

[4] *Miller* v. *Inter. Ocean Ass. Co.*, 158 S.E. 706 (W. Va.).

[5] Germany: Supr. Court, March 24, 1914: *Review of Leipzig*, 1914, 1903. Switzerland: Roelli-Jaeger, *Swiss Law of Insurance*, Arts. 87–8, note 11.

[6] United States: *Fare* v. *Natl. Ass. of R.P. Clerks*, 188 N.Y.S. 222.

[7] Supr. Court of Germany, May 11, 1909: *Reports of the German Office for Insurance Control*, 1909, 88. Switzerland: contra Supreme Court, *Official Reports*, vol. xxxvi, pt. 2, p. 84. Austria: Ehrenzweig, *Insurance Law*, p. 862.

[8] Court of Appeal, Berlin, March 22, 1933: *Review of Insurance Law*, 1933, 298.

Consequence of an External Agency.—The occurrence is a consequence of an external agency when it does not depend on an internal, organic preceding sequence of events. The precipitating cause is external when it involves contact between parts of the body and the outside world or between one part of the body and another.

It is unconditionally necessary to exclude every occurrence brought about by the insured's own movements ; only such injuries as are caused by a third party, or as originate from the elementary workings of the outer world, can be a ground for liability when the harmful occurrence is brought about by the injured person's own movements and by his own designs. If, however, he did not realize the import of this occurrence, and if on that account it was not completely controlled by his (the injured's) will, there is no essential contrast to the causes external to the body.[1]

Examples : fractures by unskilled movements ; awkward, unexpected and unusual twists of the body,[2] injuries from lifting heavy weights.[3] Drowning may be termed an accidental death when the immersion in water was the sole cause.[4] If insensibility was first brought about by an epileptic fit or by some such reason, we cannot speak of it as an accident. Of course, if the insured was seized by the fit, etc., while swimming and thus incapable of helping himself, his death by drowning may be classed as accidental.[5]

On the other hand, injuries by swallowing have been considered the result of incorrect movements of internal organs. The liability of the insurer has, however, been upheld when a small piece of bone had slipped down the throat and injured the intestine, or when the insured had broken his jawbone in biting a ship's biscuit[6] (a "Bretzel" in the case reported).

The necessity of an external cause for the occurrence must not be confused with its external effects. That these consequences may or may not be external or visible is of no importance.

[1] Court of Appeal, Celle, February 2, 1934 ; *Review of Insurance Law*, 1934, 236.

[2] Germany : Supreme Court, *Official Reports*, vol. lv, p. 408. Switzerland : Supreme Court, March 18, 1918 ; *Cases of Swiss Courts on Insurance Law*, ii, No. 168.

[3] Germany : Supreme Court : *Official Reports*, vol. 97, p. 189. Switzerland : Court of Appeal, Berne, November 13, 1886 : *Cases of Swiss Court on Insurance Law*, i, 328. Great Britain : *Hamlyn* v. *Crown Accident Ins.*, (1893) 68 L.T. 701.

[4] *Trew* v. *Railway Passengers Ass. Comp.*, (1861) 4 L.T. 883.

[5] Switzerland : Trib. of District of Schwyz, February 5, 1932 ; *Cases of Swiss Courts on Insurance Law*, vi, No. 168. Germany : Court of Appeal, Celle, February 2, 1934 : *Review of Insurance Law*, 1934, 236. Great Britain : *Reynolds* v. *Acc. Ins.*, (1870) 22 L.T. 820. France : Dubious : Civil Trib. of Marennes, March 13, 1934 ; *Gazette du Palais*, June 3, 1934 ; *Revue générale des assurances*, November 1934, 862, note Picard. Austria : Ehrenzweig, *Insurance Law*, p. 862.

[6] Germany : Court of Berlin, November 5, 1930 : *Review of Insurance Law*, 1930, 10. Austria : Supreme Court, February 3, 1905 : *Official Reports*, vol. viii, No. 2952. Czechoslovakia : Supreme Court, 1926. *Cases* (Collection Vážný), Rv. I, 1922–6.

Interpretation of Violence.—Since the introduction of the word "violent" in the definition of accident, the jurisprudence has persisted in refusing to interpret it in the sense of an assault which provokes resistance, conscious or unconscious, but in any case serious, on the part of the injured.

The courts have regarded it rather as indicating the exclusion of internal processes.[1] "Violence" has therefore been interpreted in the sense of outward violence, and the exclusion of the idea of internal violence is sufficiently indicated by the term "external" so that modern policies might easily abolish this requisite.

Mechanical Causes.—Modern policies no longer require that the happening should be physical, *i.e.* mechanical (*damnum corpore datum*). If, notwithstanding, the requisite appears in a policy, then any chemical, thermal or electrical accident will not be a ground for liability.[2] This condition is also important when liability for poisoning and infection is considered. Even if the suddenness of the entrance of poison or infectious germs into the body of the injured has been established, there can be no liability, because the occurrence is not a mechanical one. But when, as in Germany and Switzerland, most of the companies have suppressed these conditions, such events must cause liability, *e.g.* the bite of a poisonous insect causing death.[3] The same solution is to be given in the case of blood poisoning (tetanus) brought on by the treatment of a pimple where the tissues break up and staphylococci find an entrance.[4] In both cases we have a mechanical occurrence and we may find the same thing happening even in such an insignificant matter as a simple scratch. It is clear, however, that we have no mechanical condition when the infectious cocci have found an entrance by the normal respiratory organs. It is quite possible, nevertheless, that the infection might be caused by a sudden, external occurrence, such, for example, as inhalations, breath blown on the insured,[5] drinking a poisonous liquid, eating bad oysters.[6]

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[1] Germany: *Official Reports*, vol. xix, p. 63. Switzerland: Roelli-Jaeger, *Swiss Law of Insurance*, Arts. 87–8, note 11. Austria: Willer, *loc. cit.*, p. 5. United States: *American Acc. Co.* v. *Rhigart*, 23 S.W. 191 (Ky.). But: "Violent means that the agency caused injury."

[2] Except the case of a special clause including them. Trib. of District of Zürich, March 4, 1932: *Reports of the Swiss Federal Office of Insurance*, 1934, 187.

[3] Germany: Supreme Court, April 14, 1922: *Reports of the German Office for Insurance Control*, 1922, No. 1267. Switzerland: Court of Solothurn, December 11, 1919: *Cases of Swiss Courts on Insurance Law*, iv, No. 279. South Africa: *Castle Estate* v. *Southern Life Ass.*, (1906) 16 C.T.R. 562.

[4] Austria: Supreme Court, October 14, 1930: *Official Reports*, vol. xii, p. 207. Switzerland: Court of Vaud, November 10, 1921: *Cases of Swiss Courts on Insurance Law*, iv, No. 241. Great Britain: *Weyerheuser* v. *Evans*, 43 LC.L. Rep. 62.

[5] Switzerland: Court of Tribunal of Canton of Schwyz, January 26, 1932: *Reports of the Swiss Federal Office of Insurance*, 1934, 168. Germany: Supreme Court of Germany, Feb. 5, 1932: *Review of Insurance Law*, 1932, 75.

[6] Italy: Tribunal of Turin, June 26, 1931: *Foro Subalpino*, 1931, 1327. Switzerland: Tribunal of Zürich, March 4, 1932: *Reports of the Swiss Federal Office for Insurance*, 1934, 167.

Thus a company is only liable, when a mechanical occurrence is not a condition of the policy or when, as is also common, such occurrences are included by a special clause.[1]

Disorders from Mental Influences.—Even when mechanical events are no longer specified, one cause of injury is still excluded in most policies: namely disorders arising from the influence of the mind. Attention should be drawn to the fact that mental influences are excluded only when they constitute the cause of the accident, but never when they are the effect of it. The line between the mental consequences of an accident which give rise to indemnity and the disorders caused by the mental influence which do not is sometimes difficult to mark.

Railway accidents afford instructive examples. Take as an instance a man who has suffered a nervous shock which has rendered him unfit for employment. This is a case in which the court must decide, according to the particular circumstances, whether or not the insurer is liable. Indemnity must be paid when, for instance, the insured was a passenger on the train and suffered at the actual moment of collision a mechanical jolting and jarring. This holds even although the particular carriage was not derailed. Mental injury is a ground for indemnity even when its physical causes have combined with mental elements (excitement, cries of terror, etc.). The essential point in the matter is that the insured has suffered some physical effect.[2]

There is, on the contrary, no liability when the insured witnessed an accident while standing on a railway embankment or when, although actually on the train, he received a nervous shock in consequence of the apparent imminence of a collision which, however, did not take place.

Again there is no question of liability when the insured sustained comparatively little shock from the actual collision, but suffered a severe shock to his nervous system after seeing the maimed and dead. In the same way the liability to pay insurance might not be upheld if, for example, the insured, a signalman in the employment of the railway company, endeavoured to prevent an accident to a train by signalling to the driver, and the excitement and fright arising from the danger to the train produced a nervous shock.[3]

Consequently the essential point in the matter is not whether the consequences of the accident, as being of solely a physical character, are a ground of liability, but rather whether the cause of the accident is a purely physical one.

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[1] United States: *Zürich Gen. Acc.* v. *Flickinger,* 68 A.L.R. 167.

[2] Norway: Supreme Court, September 9, 1933: *Official Reports,* 1933, 31 (motor-car accident). France: Supreme Court, February 5, 1935, *Recueil périodique des assurances,* 1935, 238 (motor-car accident). Germany: Supreme Court, June 5, 1934: *Review of Insurance Law,* 1934, 197 (railway accident).

[3] Germany: Court of Berlin, August 8, 1934: *Review of Insurance Law,* 1935, suppl., p. 27. Austria: Supreme Court of Vienna, May 2, 1901: *Official Reports,* vol. v, 1904. Great Britain contra: *Pugh* v. *London, Brighton and South Coast Ry. Co.,* (1896) 2 Q.B. 248. Welford, *The Law Relative to Accident Insurance,* p. 274.

Accident regarded as Bodily Damage.—The happening, as it has been described, is not an accident when it does not affect the body (*damnum corpore datum*). The accident is not simply the event that caused the injury, but that damage to the body which is regarded as the effect of the event.

The term "body" must be taken in its widest sense and opposed to the ideas of "spirit," "soul," "feeling." Simple disorders of the physical well-being without any demonstrable anatomical reason may be caused by pure vexation or depression or shock ; indisposition due to noise, odours, vapours, gases, smoke.

But all other damages are considered as bodily injuries even if proof of a severe nervous shock cannot be established.[1] Thus bodily injury has in the actual development of the law in the courts become identical with damage to the health. The term " body " is taken in its widest medical significance. Since, therefore, the mental faculties have their seat in the body, disorders of these faculties are injuries to the health in so far as a change in the efficacy of the organs in question is demonstrable. Nervous pains and neuroses,[2] neurasthenia, shocks to the nervous system, mental diseases, loss of memory, paralysis, etc., are all injuries to the health, even if there is no apparent physical injury.

Loss of hair, insignificant scratches, spots, pimples or scars are not sufficient to justify a claim for indemnity. Loss of the power of procreation is always an injury to the health apart from consideration of the possibility of consequent nervous or physical disorders. A claim for indemnity must, of course, be recognized when inability to work is the consequence of an accident.

Consequently once it is clear that what has occurred was an accident, it is immaterial that the bodily injury has as its further result a serious disease.[3] There is no incompatibility in the statement that ill health is the result of an accident, and it may well happen that ill health has provoked an occurrence which fulfils the preceding conditions. The injured, while in a railway station, was seized with a fit and fell off the platform on to the rails and the resultant severe mental disturbance directly led him to commit suicide some days later. In this case the insurance company was liable.[4]

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[1] Except when an organic traumatic change is a condition of the policy. Court of Königsberg, February 7, 1933 : *Review of Insurance Law*, 228. Court of Lyon, November 16, 1933 : *Recueil périodique des assurances*, 1934, 46.

[2] Germany : Supreme Court, December 21, 1915 : *Reports of the German Office for Insurance Control*, 1916, No. 913. Austria : Supreme Court, February 2, 1905 : *Review of Insurance Science*, 1908, 567. Switzerland : Court of Zürich, March 27, 1929 : *Cases of Swiss Courts on Insurance Law*, vi, No. 308. France : Supreme Court, July 11, 1933 : *Recueil périodique des assurances*, 1933, 353.

[3] Switzerland : Court of Vaud, November 10, 1921 : *Cases of Swiss Courts on Insurance Law*, iv, No. 241 (syphilitical infection). Canada : *Morran* v. *Railway Passengers Ass. Co.*, (1919) 44 D.L.R. 647.

[4] Supreme Court of Germany, June 5, 1934 : *Review of Insurance Law*, 1934, July. Austria : Willer, *Accident Insurance*, p. 10.

We must admit the same solution for the case in which the insured died as the result of a surgical operation necessitated by an accident,[1] and for that in which the insured, in consequence of an accident, acquired the habit of taking veronal, of the abuse of which he finally died.[2] A clause in British and American contracts [3] limiting events insured against to those sustained "directly, solely and exclusively through accidental means" is not often found in Continental policies. The doctrine of proximate cause is not generally applied in Continental law.

Finally, the wide interpretation which Continental jurisprudence has given to the term "bodily injury" shows that a restriction of accidents to those caused by visible means, or causing visible marks on the body, such as we find in some British and American contracts, is unknown.[4]

In the former case (visible means), sufficient provision is given by the words of the definition of accident. Liability has also been incurred by mental injuries,[5] hernias [6] and other purely internal diseases [7] which produce no visible mark on the body.[8]

[1] Germany: Supreme Court, December 25, 1907: *Review of Insurance Science*, 1908, 282. Switzerland: Court of Appeal, Basle, September 23, 1902: *Cases of Swiss Courts on Insurance Law*, i, No. 271. France: Court of Appeal, Paris, September 20, 1909: *Journal des Assurances*, 1910, 590. Great Britain: References by Welford, p. 272.

[2] Germany: Supreme Court, December 20, 1929: *Report of the German Office for Insurance Control*, 1930, 2064. Austria: Ehrenzweig, *Jur. Wochenschrift*, 1930, 1587. Switzerland: Roelli-Jaeger, *Swiss Law of Insurance*, Arts. 87–8, note 62.

[3] Welford, pp. 284 *et seq.* Continental Examples: France: Civ. Court of Belfort, November 17, 1931: *Recueil périodique des assurances*, 1933, 330. Belgium: Appeal Court, Liége: *Revue générale des assurances responsabilités* (Bruxelles), 1934, 1525.

[4] Welford, pp. 269 and 277. Cady, *American Insurance Law*, p. 229.

[5] Switzerland: Court of Aargau, June 22, 1929: *Cases of Swiss Courts on Insurance Law*, vi, No. 333. Germany: Supreme Court, March 1, 1934: *Official Reports*, vol. 103, p. 144.

[6] Supreme Court of Switzerland, July 5, 1918: *Cases of Swiss Courts on Insurance Law*, iv, No. 242.

[7] Court of Schwyz, February 5, 1932: *Reports of the Swiss Federal Office for Insurance*, 1934, 169.

[8] Perspiration and gas emanating from body were held to constitute "visible marks" (*Memiciley* v. *Employers' Liability Assurance*, 148, New York, 598).

MENS REA IN GERMAN AND ENGLISH LAW—II.

[*Contributed by* PROFESSOR HERMANN MANNHEIM.]

Exceptions to the General Principle of Mens Rea.—1. **Erfolgsdelikte.** —As a rule the mens rea has to include the whole external Tatbestand; in the case of Mord, the Vorsatz, therefore, must refer to the killing of a human being. There are, however, several very important exceptions to this principle. The most significant of these are the so-called Erfolgsdelikte. These are statutory crimes which are qualified by especially aggravating results. They are crimes, so to say, of two storeys. The ground floor is occupied by the so-called Grunddelikt. As an instance, one may take the Körperverletzung mit tötlichem Ausgange (§ 226 StGB). This offence, as to the external Tatbestand, corresponds entirely to the crimes of Mord and Totschlag. The whole difference is in the sphere of mens rea: The actor's Vorsatz refers here only to the Körperverletzung (the inflicting of bodily harm) as the Grunddelikt, not to the aggravating result (the death of the wounded person), which occupies the first floor. It is not even essential that the death was to be foreseen. It suffices to prove merely causality. Such Erfolgsdelikte are to be found in the Criminal Code in the following cases: Notzucht, rape (§ 178), Widerstand gegen die Staatsgewalt, resistance to lawful authority in case of § 118, Zweikampf, duel (§ 206), Freiheitsberaubung, illegal detention (§ 239), Raub, robbery (§ 251), Brandstiftung, arson (§§ 307 No. 1, 309), Überschwemmung, flooding (§§ 312/4), Eisenbahntransportgefährdung, endangering the safety of railway transport (§ 315/6), Beschädigung von Wasserbauten, the damaging of under-water building operations (§ 321), Gefährdung der Schiffahrt, endangering navigation (§ 322), Bewirken des Strandens eines Schiffes, causing of shipwreck (§ 323), Brunnenvergiftung, poisoning of wells (§ 324), as well as §§ 327/8 and several Nebengesetze. Summarizing, it can be said that the German Criminal Law has permitted the possibility of an aggravated punishment only for such offences as are frequently in ordinary life followed by fatal consequences. There is no theft or false pretences with a fatal result to be found in the Criminal Code. Many writers have gathered from this fact that to the Erfolgsdelikte, instead of the doctrine of the *conditio sine qua non*, the so-called theory of the adequate causation is applicable, which states that in legal matters only a probable (*i.e.* an adequate) cause is to be treated as a cause at all.[1]

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[1] See Frank, *Kommentar zum StGB*, § 1, iii, 2b; Mezger, *Lehrbuch des Strafrechts*, p. 124; but v. Liszt-Schmidt, *Lehrbuch des Strafrechts*, 26 ed., 1932, § 29, vii, 4; Radbruch, *Vergleichende Darstellung Allg. Teil*, Bd. ii, p. 234/5.

The occurrence of the more serious result effects an aggravation of the minimum or maximum of the punishment which is determined by the statutes. In §§ 178 and 251, for instance, the minimum, which is in the normal case (§§ 177 and 249) one year Zuchthaus, is increased to ten years; in § 226 the minimum as well as the maximum is increased. But the occurrence of a fatal result innocently caused never has the power of transforming the original crime into murder, and never, therefore, leads to infliction of the penalty of death.

The history of these Erfolgsdelikte has been profoundly investigated chiefly by Alexander Löffler in his above-mentioned book on the *Schuldformen des Strafrechts*, and is very interesting. A comparison between the German and the Anglo-Saxon development is here instructive. The origin of the Erfolgsdelikte lies in the Canon Law, but in the Canonical doctrine of "irregularity," not in the Canonical Criminal Law.[1] The system of irregularity in Canon Law pursued the aim of excluding from clerical functions those persons who, in consequence of their behaviour, are not worthy of holding such an office. Malicious killing, of course, caused irregularity. But not only *dolus* and *culpa* were considered as species of mens rea. On the contrary, an act of homicide which was committed without guilt but in the performance of an unlawful action was also treated as malicious homicide and also, therefore, caused irregularity. *Versanti in re illicita imputantur omnia quae sequuntur ex delicto.*

This theory, according to Löffler, is to be found first of all in the *Summa decretalium* of Bernardus Papiensis, which was written between 1191 and 1198.[2] This theory, however, referred—even in the Canon Law of irregularity—only to the particular crime of homicide and was not intended to be a general principle of imputation.[3] The decisive mistake was that later the theory was transmitted to the Criminal Law and was there applied to all kinds of offences. The reason for this, as Löffler[4] quite rightly states, was that the narrow Roman conception of *dolus*, which emphasized the element of will too much, was quite remote from the German feeling of justice. In addition to this, the clumsy old German Criminal Procedure, with its formalized law of evidence (as *e.g.* duel, ordeal, cojurors and so on), was unequal to the task of proving the Roman *dolus*. An alleviation of this task became necessary, and this was undoubtedly supplied by the doctrine of *versanti in re illicita*. Thus this doctrine gained an unexpectedly wide application. It penetrated the Italian Statutory Law,[5] and is also to be found in the Constitutio Criminalis Carolina, 1532. The famous Art. 146 of the latter, which attempts to explain the conception of Fahrlässigkeit by giving some examples, begins with the words: "Item so eyner eyn zimlich unverbotten werck an eynem end oder ort da solch werck zu üben zimlich ist thut," etc. Therefore this Art. 146 makes the acquittal of the offender, as well as the infliction of the more lenient penalty imposed upon negligence, dependent on the fact that the actor had been negligent in performing a lawful act. The Spaniard Covarruvias (1512–1577) attempted to provide the doctrine with the support of Thomas Aquinas' philosophy.[1] Thomas, like Bentham[2] later, differentiated directly and indirectly intended results. "A person who wishes the cause also wishes the result." The great importance of this tenet for the Criminal Law, as Löffler[3] explains, consists in the formal reconciliation of the enlargement of criminal imputation with the Roman doctrine: *in maleficiis voluntas spectatur, non exitus*. Hence started the doctrine of the *dolus indirectus* which dominated the German Criminal Law for several centuries. Carpzow, who became notorious for his severity in the witches' trials, borrowed the conception of *dolus indirectus* from Covarruvias.[4] Feuerbach, who, it is true, did not recognize the *dolus indirectus* as such, said that everyone who performs an unlawful act must be especially cautious.[5] He proceeded from a very narrow conception of *dolus* and, therefore, he was compelled to enlarge it by a presumption which he dropped later. In his text-book he said[6]:

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[1] Löffler, *Schuldformen*, pp. 136 *et seq.*

[2] With the fact that this doctrine was brought by Bracton to England (see Pollock and Maitland, *Hist.*, ii, p. 475) I shall deal later, when discussing the English law.

[3] Löffler, p. 142.

[4] P. 152.

[5] See Georg Dahm, *Das Strafrecht Italiens im ausgehenden Mittelalter* (Berlin and Leipzig, 1931), pp. 259 *et seq.*

> Any person who, intending to commit a crime, carries out an action which may cause a minor as well as a more serious injury, is to be punished for the evil result actually caused, just as in the case of an intentional wrong-doer. He shall not be permitted to use the pretext that he had intended only the minor offence.

Very characteristic is § 1 of the Austrian Criminal Code of 1852 (still in force):

> For every crime wicked intent is not only to be assumed when the evil which is connected with the crime had directly been premeditated and determined before, or during the execution or omission, but also when, with another wicked intent, something had been done or omitted which generally causes, or, at least, may cause, the evil result which was really caused.

Here, therefore, at least negligence (in its objective meaning) is demanded as to the serious result. Arguing thus, the Austrian Criminal Code carries on the line of development pursued by the doctrine of *versanti in re illicita* in the later Italian law. The phrase *res illicita*, originally meaning a prohibited action, later, in the days of the Postglossatores, acquired the much more just sense of "dangerous action"; see, for instance, the formulation of Bartolus: *Si quidem delictum, quod principaliter facere proposuerat, tendit ad illum finem, qui secutus est, et tunc inspicimus eventum. Si vero ad hoc non tendebat delictum, quod principaliter facere*

Löffler, pp. 158 *et seq.*

[2] See Kenny, *Outlines* 14, ed. 1933, p. 40.

[3] Löffler, pp. 161.

[4] Löffler, pp. 166 *et seq.*

[5] Löffler, pp. 212 *et seq.*

[6] 2nd ed., Art. 41. See v. Hippel, *Vergleichende Darstellung Allg. Teil* iii, pp. 454 *et seq.*; Berner, *Lehrbuch des deutschen Strafrechts*, 1857, p. 149, fn. 2.

proposuerat, tunc non tenetur.[1] This idea, when standardized, leads to the conclusion that the liability for the mere result ought to be recognized only in the case of such crimes as show a tendency to cause so serious results. Thus has arisen the institution of the Erfolgsdelikte in the present law.

The Draft Codes unanimously have proposed the repeal of the Erfolgsdelikte in their present form by demanding that the serious result, at least, must be due to negligence. And it seems that this demand will be continued in the future.[2]

2. **Reference to External Tatbestand.**—The requirement of guilty mind—save the Erfolgsdelikte—is to be referred to the whole external Tatbestand and solely to it. Such parts of a statute, however, as do not belong to the external Tatbestand are not to be referred to the guilty mind. So, of course, is not included the internal Tatbestand itself, and this means, for instance, that the actor need not know whether he is sane in the legal sense or not. But besides the internal Tatbestand there are many other parts of the criminal statutes to which the mens rea need not be referred. That is a strange phenomenon which enables the legislator as well as the courts to make invalid, for practical purposes, the generally established principles of the doctrine of mens rea within certain limits. I am discussing the so-called Bedingungen der Strafbarkeit (conditions of punishment), the nature of which I may be permitted to explain by giving a few examples :

§ 113 StGB enacts that a person shall be punished who offers resistance to an executory officer during the lawful exercise of his official duty by violence or by threats of violence. Here the actor has to know that he is offering resistance to an executory officer in the pursuance of his official duty. But, according to the practice of the Reichsgericht,[3] he need not know that the exercise of the official duty is lawful. Even if he be convinced that the officer is acting unlawfully, he is punishable if this conviction is later proved to be wrong. He acts at his own risk. The Reichsgericht substantiates the rightness of this point of view by quoting the genesis of § 113 and, above all, by emphasizing the practical political reflection that the purpose pursued by § 113 would be frustrated by any other interpretation. Therefore the Reichsgericht states the lawfulness of the officer's activity to be a mere Bedingung der Strafbarkeit.

Another example : According to § 186 StGB a person shall be guilty of Üble Nachrede (criminal libel or slander) who " with regard to another maintains or circulates as a fact something which is qualified to render the other contemptible, or with the object of degrading the other, in the public opinion, unless the fact maintained or circulated by the actor can be proved as true." Here the impossibility of proving the aforesaid fact is a mere Bedingung der Strafbarkeit. The actor, therefore, is to be punished even if, through some error, he had been convinced that his statement was true and provable.[1]

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[1] See Dahm, *op. cit.*, pp. 259 *et seq.*, especially p. 262 ; the author's book, *Der Massstab der Fahrlässigkeit*, p. 57.

[2] See Schaffstein, *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 53 (1933/4), p. 609 ; and the Official Report *Das Kommende deutsche Strafrecht*, (1934) p. 54.

[3] See *e.g.* RGSt 55, p. 161 ; 60, p. 342. In the literature this doctrine had been strongly attacked ; but Kantorowicz, in his interesting book, *Tat und Schuld*, 1933, p. 241, follows the Reichsgericht.

Kantorowicz[2] recently published an exhaustive survey of the statutes containing such Bedingungen der Strafbarkeit and a deep and thorough analysis of their peculiar features. He distinguishes five grammatical forms of their appearance, the most important of which is the form of the conditional clause,[3] which is also used in the Italian Criminal Code (see Art. 44).

3. **Übertretungen.**—In consequence of their extraordinary great number and of their importance in everyday life the so-called "Übertretungen," and especially the "Polizei-Übertretungen" play a considerable rôle. Many of these are contained in §§ 360 *et seq.* StGB; others are found among the Nebengesetze. There was formerly a widely held opinion that, as a characteristic feature of these Übertretungen, they could be punished without the existence of any kind of guilty mind. This point of view has, however, been abandoned at the present time. So far as the Übertretungen are contained, at least formally, in the criminal statutes, and are to be tried according to the rules of the Code of Criminal Procedure,[4] a minimum of guilty mind, usually negligence, is to be required for punishment.

It is quite another question whether, perhaps, it might be preferable to eliminate most of the Übertretungen from the substantive and adjective Criminal Law at all—a solution which has already been under discussion for a long time.

Closely connected with the question of the Übertretungen is the problem of the presumptions of mens rea (Schuldvermutungen). Such presumptions, forming as they do exceptions to the general principle of Criminal Law, *in dubio pro reo*, are to be found most frequently in the border territories between Criminal and Administrative Law, to which latter most of the Übertretungen belong. The less important an offence is, and the more lenient, therefore, the punishment, the more easily it can be suggested to replace the evidence of guilty mind by a presumption.

In the German Criminal Code there is only a single presumption of guilty mind: According to § 186 the prisoner is to be convicted of Üble

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[1] RGSt 19, p. 386; 25, p. 355; 29, p. 44.

[2] Kantorowicz, *Tat und Schuld*, pp. 229 *et seq.* Kantorowicz also counts the serious result in the case of the above-discussed Erfolgsdelikte among the Bedingegunn der Strafbarkeit.

[3] See, for instance, §§ 139 and 186 StGB.

[4] See §§ 407–429 of the *Strafprozessordnung*, but, on the other hand, now the new Prussian Polizei-Verwaltungsgesetz which, for many of the Übertretungen, takes away the procedure from the ordinary criminal courts and transfers it to the administrative courts and the police.

Nachrede if the truth of his statement cannot be proved. This proceeds from the formulation of this statute : " . . . if this fact be not provable." Furthermore, § 20 II of the *Reichspressgesetz* may be mentioned here: It is presumed that the verantwortliche Redakteur[1] had knowingly permitted the publication of the objectionable part of the periodical and had known and correctly interpreted its contents. He is, therefore, "to be punished as the actor unless the presumption of his being the actor is rebutted by particular circumstances."[2] If such circumstances (as, for instance, a serious illness of the verantwortliche Redakteur) cannot be proved, he is to be punished.

Most presumptions of guilty mind are to be found in the statutes relating to the customs and taxes. But as these are so frequently changed, an enumeration of them seems scarcely advisable.

Mens Rea and Zumutbarkeit.—Any account of the German doctrine of mens rea which—as had been done here—dealt with the particular species or degrees of mens rea, as Vorsatz, Fahrlässigkeit, etc., and with the exceptions from the general principle, without attacking the pivotal problem of mens rea itself, would be incomplete. In the last decades the German science of Criminal Law has undergone a change as to the relation between these species or degrees of mens rea and the conception of mens rea itself. In former times it seemed to be an established fact that mens rea was nothing else than the conception set above the subspecies Vorsatz, Fahrlässigkeit, etc., without having an independent substance of its own. It seemed to be useless to waste time investigating the conceptions of mens rea, and of Fahrlässigkeit too, instead of exploring the conception of Vorsatz. Whether both this conception and the conception of Fahrlässigkeit were fit to be subordinated to the conception of mens rea was never discussed. It was not until the last decades that the latter conception found an independent consideration. It was then discovered that to this conception an element is essential which was contained in the conception of Fahrlässigkeit, but not in that of Vorsatz, as this latter had been hitherto understood : viz. an element of norm or valuation (in German : "normatives, wertendes" element). The conception of Vorsatz, used by the German Criminal Law, was, in spite of its strong accentuation of the element of will, after all more psychological than ethical and "normativ." It did not mean that the act committed vorsätzlich was necessarily wicked. For, knowingly and wilfully, one can commit good, as well as bad, actions. One can take a walk, as well as kill a person, vorsätzlich, nay, even absichtlich. As the well-known proverb has it, the way to hell is paved with "guten Vorsätzen" ; there are, consequently, good Vorsätze too. In the conception of Fahrlässigkeit, however, the breach of an obligation to foresee and avoid the evil result (the German Voraussehensollen und Vermeidensollen) is a necessary constituent. Then, so it was further argued, such an element of non-value, of course, must be contained in the conception of Vorsatz all the more, seeing that it was the stronger species of guilty mind. Or, considering another possibility, this element of non-value may be involved not in the conception of Vorsatz as such, but in the general idea of mens rea, which latter indicates blameworthiness (the German Vorwerfbarkeit). That person only acts with mens rea and is, therefore, punishable who can be blamed for his behaviour, because he could be expected to act in another way. This blameworthiness has been differently interpreted, some writers taking it more in a moral sense,[1] others more in a sociological sense. The latter meaning has been expressed with a special clearness in the last edition of the text-book of Franz von Liszt. Here the editor, Professor Eberhard Schmidt, says that, in fixing the limits of what may be expected of a human being, one should consider the efficaciousness of the law with regard to an average citizen, not to a hero. "One should take into account the fact that a human being is not merely a member of a community, but also an individual and, as such, not always able to comply with the demands of the community. In such a way we endeavour to reconcile the antagonism, which can never be entirely removed, between the individual and the community. It is the very quintessence of the modern Schuldhaftung that one has recognized this antagonism by acknowledging the individual. . . ."[2] This doctrine has been supported dogmatically by a prescription of the Criminal Code itself, viz. § 54, which deals with the so-called Notstand and reads as follows (Gage and Waters' translation) :

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[1] An expression of which "responsible editor" is only an approximately correct translation.

[2] As to § 20 II of the *Reichspressgesetz,* see the author's *Pressrecht,* pp. 60–70.

> An act committed in order to rescue the perpetrator or a relative from present danger to life or limb in an emergency other than self-defence, not caused through the fault of the former and not otherwise to be averted, is not punishable.

I cannot go deeply into the particulars of the very extensive German literature dealing with Notstand ; but I would like to indicate the part played by § 54 (and by the cognate but more restricted § 52) in the development of the modern doctrine of mens rea. It was the tendency of many writers to treat this prescription not as an exception, designed merely to enable the courts to pay regard to a state of necessity, but as a self-evident consequence of the general idea of Zumutbarkeit, which stood above the positive law.[3] This standpoint[4] effected an extension of the fundamental idea of § 54 to analogical cases—an extension which was not prohibited by the Analogie-Verbot contained in § 2 StGB ; for § 2 forbade the analogical application of criminal statutes only against the prisoner, not in his favour.[5] In particular, there was a tendency towards setting aside the requirements, contained in § 54, of the presence of danger, of danger to the life or limb of the perpetrator himself or a relative, and towards allowing actions resulting from necessity to go unpunished even when committed in order to avoid future dangers or merely economic difficulties. The Reichsgericht yielded, at least for a time, and in part, to these tendencies. For some years it went rather far in lending itself to the idea of Unzumutbarkeit, *e.g.* in cases of perjury as well as homicide.[1] It allowed to go unpunished an act of perjury committed in a political trial, because, before the trial, members of the hostile party had threatened the witness with death after the trial if he should reveal the truth. It was not until very recent years that the Reichsgericht returned to a more restrictive interpretation of the conception Unzumutbarkeit, and that happened obviously as a result of the violent attacks which it has suffered. Among the first attacks, about ten years ago, was that made by the late Professor Moritz Liepmann, the well-known criminologist and prison-reformer and anything but an anti-Liberal, who attacked the doctrine of Unzumutbarkeit as a " softening of the bone " of Criminal Law. Some of his pupils joined him, but it was only after the decline of Liberalism in Germany that the counter-attack set in with full force. It was introduced by a pamphlet written by Georg Dahm and Friedrich Schaffstein, *Liberales oder autoritäres Strafrecht* (1933) and by Schaffstein's book, *Die Nichtzumutbarkeit als allgemeiner übergesetzlicher Schuldausschliessungsgrund.* In the latter monography Schaffstein emphasized that the psychological effect of the threat of punishment had been eliminated by the introduction of the idea of Zumutbarkeit ; instead of educating the average citizen up to a higher level of achievements, the criminal justice, so he declared, suffered the average citizen to dictate to it the standard of its requirements.[2] " The National-Socialist view of the world, ruling in Germany," says another writer,[3] " is entitled to decide according to its own principles what is zumutbar." And Professor Wegner states that, if the Zumutbarkeit is accepted as an essential part of mens rea at all, then this idea must be utilized in such a manner that it, here and there, augments the responsibility and not merely diminishes the guilt.[4]

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[1] See Freudenthal, *Schuld und Vorwurf*, 1922, p. 27 ; Paul Merkel, *Juristische Wochenschrift*, 1924, p. 1679 ; Kantorowicz, *Tat und Schuld*, p. 19.

[2] v. Liszt-Schmidt, *Lehrbuch des Strafrechts*, vol. i, 26 Aufl., 1932, p. 224.

[3] With regard to this expression see, for instance, Jenks, *The New Jurisprudence*, 1933, p. 41.

[4] v. Liszt-Schmidt, § 42, ii–iv.

[5] The prohibition of analogy is now abolished by the Act of June 26, 1935.

It is undoubtedly to be expected, therefore, that, as a reaction against certain exaggerations of the normative Schuldlehre which had, perhaps, paid too much regard to the human weaknesses of the individual, a strong accentuation of the necessities of the State will dominate German criminal justice in the immediate future. The Einwilligungstheorie will be displaced by the Wahrscheinlichkeitstheorie, the subjective standard of the Fahrlässigkeit probably by the objective, the doctrine of Zumutbarkeit by the motto : " You can, because you ought ! " (Du kannst, denn Du sollst !). By this I do not mean to say that the principle of mens rea and the emphasis hitherto laid upon the element of volition will be abandoned entirely. The accentuation of the element of will in the German Criminal Law is, in my opinion, to be traced back mainly to these two sources : firstly to the influence of Roman Law,[1] and secondly to the influence of Hegel. In the legal philosophy of Hegel punishment also aims at overcoming the bad will.[2] He and his followers—I quote here only Köstlin, Berner and Hälschner as a few of the most noted—considered a punishable action chiefly as an immoral action, and the conception of mens rea not as a specific juristic, but as a moral conception.[3] This point of view (and one not to be overlooked), has not, however, only effects which, as mentioned above, favour the prisoner, but in other respects enlarges the possibilities of punishing. This is shown especially with regard to the doctrine of the criminal attempt. It is an interesting fact that it was Köstlin himself who laid down the principle that every attempt must be punished which, however unsuitable the means, proves the wicked intent.[4] The Reichsgericht, from its foundation, has followed also a very subjective theory concerning the treatment of attempts, and this theory, based entirely upon the question of will, effects the punishment of every action capable of causing an obnoxious result though it be only in the erroneous opinion of the actor.

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[1] See, for instance, RGSt 60, p. 101 ; 66, pp. 98 and 222 (= *Jur. Wochenschrift*, 1932, p. 2290/1) ; *Jur. Wochenschrift*, 1934, p. 422, No. 20.

[2] *Cf.* the review of Schaffstein's monography by Matzke in *Juristische Wochenschrift*, 1933, p. 2261.

[3] Kuhnke, *Jur. Wochenschrift*, 1934, p. 528.

[4] *Jur. Wochenschrift*, 1934, p. 422.

Although the German Criminal Law in future will endeavour to throw off the influence of the Roman law, the authority of Hegel will continue. So, for instance, Schaffstein, in his essay, *Nationalsozialistisches Strafrecht*,[5] containing a review of the homonymous Denkschrift of the Prussian Ministry of Justice, argues as follows :

> Besides the repeal of the Analogie-Verbot, the change from the Erfolgsstrafrecht to the Willensstrafrecht is the most important reform proposed by the Denkschrift. The proposed changes will manifest themselves mainly in the fundamentally equal treatment of the attempted and completed action, in the repeal of the Erfolgsdelikte, in the approval of the subjective theory as to the inept attempt, and in a very far-reaching punishment of mere preparations. This Willensstrafrecht of the Denkschrift is justified mainly on two grounds : the power of the law is fortified by the transfer of punishment to an earlier stage ; the possibility of punishing becomes more comprehensive. Moreover, the accentuation of the element of will, corresponding to the method of moral valuation—a method which takes into account only the goodness or wickedness of the will, not the casual result—is in harmony with the general trend of the Denkschrift towards morality. Both the series of ideas empha-

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[1] I may, perhaps, be permitted to refer to my remarks as to the history of the doctrine of *versanti in re illicita*. The German conceptions of guilty mind have succumbed to the Roman conceptions, says Binding in his great work, *Die Normen und ihre Übertretung* vol. ii, p. 269.

[2] See Landsberg, *Geschichte der deutschen Rechtswissenschaft*, iii, Abt. 2, Halbband, pp. 349 and 677/8 ; Hegel, *Grundlinien der Philosophie des Rechts*, § 117, etc.

[3] See Hälschner, *Das Gemeine deutsche Strafrecht*, p. 184, and *System des Preussischen Strafrechts*, i, p. 128.

[4] Landsberg, *loc. cit.*, pp. 675 *et seq.*

[5] *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 53, pp. 603 *et seq.*

sized above as the fundamental principles of the National-Socialist Criminal Law join here in the same result (p. 609).

And :

> It is especially praiseworthy that the dangerous and typically individualistic impregnation of the Notstand with the idea of Zumutbarkeit is not contained . . . in the Denkschrift. The use of this vague idea in connexion with the doctrine of Notstand is so hazardous, seeing that, in times of an individualistic tendency in the administration of justice, it can destroy the whole Criminal Law. Although, for the moment, the danger of such destruction no longer exists, a National-Socialist Criminal Code, calculated for many decades, nevertheless must be extremely cautious as to this point (p. 613).

The Doctrine of Mistake in German Criminal Law.—This doctrine, which forms one of the most important and difficult parts of German Criminal Law, can only be dealt with somewhat summarily in this place. The doctrine of mistake is nothing but the doctrine of mens rea itself, treated from a particular point of view, viz. seen from the negative. If, in consequence of a mistake, some circumstances are not reflected in the interior of the actor in the manner presupposed by the statute, then such a mistake is to be considered in favour of the actor. If the mistake itself be due to negligence, then the actor is to be punished for committing the crime through negligence, provided that such an act is punishable at all, if due only to negligence ; if not, or if the mistake is excusable, the actor goes unpunished. Since the commission of very numerous crimes is not punishable when due only to negligence, there is no punishment, even if the mistake had been quite unpardonable. These are the main contents of § 59, the only section of the Criminal Code which deals *expressis verbis* with the question of mens rea. § 59 runs as follows (translated by Drage) :

> If a person in committing a criminal act was ignorant of the presence of circumstances in the case belonging to the body of facts which constitute criminality in the eyes of the law, or which augment the criminality, such circumstances are not to be imputed to him. In punishing acts committed from negligence this direction only holds good, so far as the ignorance itself is not caused by negligence.

Thus the difficulty arises : What are " circumstances belonging to the body of facts which constitutes criminality," etc. (in German : " Tatumstände, welche zum gesetzlichen Tatbestande gehören oder die Strafbarkeit erhöhen ") ? Of course, by the legal Tatbestand is meant merely the objective, not the subjective Tatbestand ; the actor as mentioned above, for instance, need not know that he is sane, etc. Furthermore, a mistake concerning the Bedingungen der Strafbarkeit or the serious result in case of an Erfolgsdelikt is unimportant too. Finally, the legal consequences established by the statute do not belong to the Tatbestand ; thus a mistake of the actor as to the question if and how this action is punishable according to the law is said to be of no consequence. But it is just this latter point which leads to the difficulties of the problem. For a mistake concerning the legal consequence is, in the majority of the cases, closely connected with a misconception concerning the legal facts conducing to the legal consequences. A distinction between the various categories of possible mistakes is reasonable only if based not upon subordinate and merely dogmatical differentiations, but upon matters which are essential for the actor's guilt. This essentiality is, in general, to be answered in the affirmative, so far as the mistake refers to facts belonging to the legal Tatbestand. For, from a rational point of view, one can assume that the statutes admit into their objective Tatbestand only such conceptions as are founded on facts which are really essential for the question of mens rea. Thus the doctrine is justified that a mistake concerning the facts which belong to the objective Tatbestand of a crime must be taken into account in favour of the prisoner, within the limits of § 59. This principle, nevertheless, also requires a cautious application. For instance, to the objective Tatbestand of murder belongs, certainly, the killing of a person. As a rule, however, the method of killing and whether the person actually killed was the person intended are not important. Supposing A intends to kill B by shooting , but B, frightened by the sight of the weapon, suddenly jumps aside, falls over a precipice and breaks his neck, then such a deviation of the real course of events from the actor's intention is unimportant,[1] because A did not lay great stress upon the particular manner of killing. But how does the matter stand when A, desiring to bring to his deeply suffering wife a quick and painless death, administers a poison which he thinks capable of bringing about this effect, but which, in reality, causes her death only after a very protracted and painful illness ? In such a case one feels, perhaps, more inclined to take the deviation into consideration in favour of the actor, since his expectation of a certain development had been decisive for him. The boundary-line, however, is very difficult to draw. Another example : A intends to kill B, but mistakes C for him, whom he kills. Such an error *in objecto* is, according to German law, unessential, always provided the two objects are of the same legal value. Quite another decision would have to be given had C been A's father. Then the objects (if the crime be considered only as manslaughter, not as murder) are not of the same value from the legal point of view, since the manslaughter of the father is to be punished more severely than the manslaughter of an absolute stranger. Therefore A can be punished only according to § 212, not to § 215 StGB. The error *in objecto* being unessential (with the aforesaid reservations), the Reichsgericht and the prevailing opinion in the literature deal with the so-called *aberratio ictus* in an entirely different way. Here the actor does not mistake the object of his attack, but the attack, which is directed towards the aim desired by the actor, itself misses its object. The shot intended for B hits C. Such cases of mistake, according to the Reichsgericht, are deemed not as a completed but only as an attempted murder or manslaughter of B, concurrently with the homicide of C, due to negligence. Thus if it concerns, for instance, crimes which are not punishable when only attempted (see § 43 II StGB) or committed by negligence (as *e.g.* the insult, § 185), the actor cannot be punished at all in a case of *aberratio ictus*. In an endeavour to justify this point of view, in its decision RGSt 58, p. 27, the Reichsgericht has advanced the following considerations which, in my opinion, are far from convincing :

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[1] This is, strange to say, by no means unquestioned in the German literature.

> The actor, although having caused the injury, had neither intended to hurt this object nor considered the injury to be an unavoidable result of his action ; an injury the occurrence of which he had not even been aware of can never be imputed to his Vorsatz, and the fact that both the objects in question enjoy an equal protection by the statutes is not able to alter the decision.

A much more difficult task than that of dealing with mistakes of facts is that of dealing with mistakes not referring to mere facts. I quite intentionally try to avoid the expression " mistake of law," since this term, as well as the dictum *error juris nocet*, is misleading.[1] In § 59 itself neither the expression " Tatsachen " nor the expression " Rechtssätze " is employed, but only the ambiguous word " Tatumstände " (circumstances of the act). Thus such circumstances as are not facts are by no means excluded by § 59. The German legislator, however, has gone still further : in two statutes of the war-time and post-war time he has acknowledged with much more distinctness that mistakes of law also must sometimes be taken into account in favour of the actor. According to the so-called " Rechtsirrtums-Verordnung " of January 18, 1917, in cases of contraventions against statutes founded upon § 3 of the *Gesetz über die Ermächtigung des Bundesrats zu wirtschaftlichen Massnahmen, etc.*, of August 4, 1914, it is permitted to stop the prosecution, " if the prisoner, due to a reasonable mistake as to the existence or applicability of the infringed statute, has believed his action to be lawful." And in a quite similar manner, but compulsorily, not only permissibly, § 358 of the *Reichsabgabenordnung* (Taxation Act of the Reich), dated December 13, 1919, says : " Anyone shall be exempt from punishment who, in a reasonable mistake as to the existence or applicability of a statute concerning the law of rates and taxes, has believed his action to be lawful." Here the importance of mistakes of law is acknowledged, but limited to reasonable mistakes. It is noteworthy that these prescriptions refer particularly to statutes dealing with matters of economy and rates and taxes ; for in these spheres the legislation is so obscure and liable to change that the fiction, " Every citizen knows the whole Criminal Law," would here be especially absurd. But where there are no such exceptional prescriptions as the two mentioned, a mistake referring only to the existence of a certain criminal statute cannot be taken into account ; the existence of a statute not being a " circumstance of the act " in the sense of § 59. Mistakes due to a wrong interpretation of the criminal statutes and, therefore, as to their applicability are, perhaps, a different matter. We are here entering into the particularly problematic territory between the mistake of facts on the one hand and the mistake of the legal consequences or ignorance as to the existence of a certain statute on the other hand. It is possible that the actor, although well informed of the facts as well as of the existence of a statute, thinks, nevertheless, his action to be lawful, since he is unaware that these facts can be subsumed under this statute. How is such a mistake concerning the subsumption (in German : Subsumptionsirrtum) to be dealt with ? It is certainly a mistake of law, for subsumption is a specifically juristic process.[1] Nevertheless, on principle it is impossible to ignore such mistakes. If A, in consequence of a misinterpretation of the legal aspect of the position, thinks the property of another to be his own, and, therefore, takes it away, he cannot, of course, be punished for larceny. How can this decision be substantiated by reasons ? Fortunately the statute in question speaks of the " Absicht, sich die Sache rechtswidrig zuzueignen " (§ 242 StGB), similarly to the English law (Larceny Act, c. 50, s. 1 : " without a claim of right made in good faith "). But other statutes are not so clear with regard to mistakes of law. The Reichsgericht, therefore, has adopted and constantly followed a conception which was contained in the former Saxonian Criminal Code of 1855 (Arts. 95 and 97). It differentiates between mistakes concerning the Criminal Law itself and mistakes concerning the other spheres of law and, in favour of the actor, takes into account only the latter kind of mistakes of law. This differentiation is obviously founded upon the dogma that everybody is bound to know the whole Criminal Law, whilst a complete knowledge of the Non-Criminal Law is not to be expected. This conception is as erroneous as the differentiation made by the Reichsgericht is impracticable. That it is impracticable is easily demonstrable : There exist legal conceptions which belong equally to the Civil Law and to the Criminal Law. Such, for instance, is the conception of self-defence (Notwehr) which is defined in a literally identical manner in both § 227 of the BGB (Bürgerliches Gesetzbuch) and in § 53 StGB. The conception " Beamter " (civil servant) belongs not only to the Criminal Law (see §§ 331 *et seq.*, § 359), but also to the Constitutional and Administrative Law, the conception " Kommissionär " (mercantile agent), although contained in the criminal section of the Börsengesetz (§ 96), belongs above all to the Commercial Law. Is a mistake concerning such an ambiguous conception unimportant, regarded as a mistake of Criminal Law, or important, regarded as a mistake of Non-Criminal Law ? It is impossible to answer these questions in a satisfactory manner. The Reichsgericht has, therefore, been compelled to make some other differentiations which seem to be scarcely justifiable. The erroneous belief of the actor, for instance, to exercise a right of chastisement which does not exist in law is considered by the Reichsgericht to be unimportant, although it belongs to a matter rooted much more in the law of domestic relations, of apprenticeship, etc., than in the Criminal Law. A mistake, however, as to the limits of a right of chastisement which does in reality exist is said to be important.

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[1] It is wrong, of course, to say that the fixing of the theoretical boundary-line between mistakes of fact and mistakes of law is entirely impossible. The differentiation that is understood does, in fact, exist ; for the contradiction between the world of reality and the realm of legal valuation cannot be entirely eliminated (see the author's monograph : *Beiträge zur Lehre von der Revision im Strafverfahren*, Abhandlungen aus der Berliner Juristischen Fakultät, vol. iii, 1925, pp. 40 *et seq.*, 59 *et seq.*, 61 ; Sauer, *Grundlagen des Strafrechts*, 1922, p. 592). The difficulty is only to decide in a particular case whether something is a question of facts or of legal valuation.

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[1] See the author's *Beiträge zur Lehre von der Revision*, pp. 64–74 and 85 *et seq.*

This theory of the Reichsgericht, which is generally disapproved by the literature,[1] has recently caused much confusion in the law concerning foreign exchange (Devisenrecht). Here the Reichsgericht, refusing to apply the above-mentioned Rechtsirrtums-Verordnung, treats economic conceptions (*e.g.* the conception Zahlungsmittel, *i.e.* means of payment) as conceptions of Criminal Law.[2]

The differentiation of the Reichsgericht is not only impracticable but also unjust. For the culpability of an action cannot depend upon merely accidental distinctions, but must be based upon its injuriousness towards society. It can matter little to which sphere of law the mistake belongs, but what matters is solely the question whether the mistake has prevented the actor from recognizing the dangerousness of his act for society. Naturally, it cannot be demanded that the actor should be able to administer the difficult legal conceptions in a correct manner ; it suffices that he executes rightly the so-called " Parallel-Wertung " (as Mezger calls it), *i.e.* the non-legal estimate of the act in the sphere of social thinking and acting, which estimate is by no means identical but runs parallel with the legal subsumption. The actor, for instance, in a case of bribery (§§ 331 *et seq.* StGB) need not know that he is a civil servant in the sense of § 359 StGB) ; he has only to know that the sociological reasons which have induced the law-giver to punish an act of bribery only when committed by a civil servant (not when committed by a private employee) are valid for him.

A special part has been played here by the mistakes concerning the so-called " Komplex-Begriffe." These are legal conceptions composed of several other conceptions not explicitly mentioned in the statutes. Here the question is whether the Komplex-Begriff is used by the law-giver only for technical reasons, *i.e.* for the sake of abbreviation, or whether it contains independent ingredients of wrongness.[3]

The Draft Codes, therefore, have proposed to focus attention upon the question whether the actor, in spite of his mistake, has acted knowing that his behaviour was unlawful. The Draft Codes employ sometimes the expression " in Kenntnis des Unerlaubten," sometimes the expression " in Kenntnis des Unrechtmässigen " ; the latter expression would cover rather the social and moral wrong, the former rather the legal wrong.

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[1] See von Liszt-Schmidt, *Lehrbuch*, § 39, fn. 6 ; Kohlrausch, *Irrtum und Schuldbegriff*, vol. i, 1903, pp. 119, 173, etc. ; Kohlrausch, *Strafgesetzbuch*, fn. 4 II to § 59.

[2] See Thiele, *Jur. Wochenschrift*, 1934, p. 733.

[3] *Cf.* v. Hippel, *Leipziger Zeitschrift für Deutsches Recht*, 1918, pp. 1033 *et seq.*

The aforesaid Denkschrift of the Prussian Ministry of Justice proposes to let the culpability depend upon the question whether the actor knows that he is acting contrary to the interests of the community (Volksgemeinschaft) and to its moral opinions.

Appendix.—Since the completion of this article there have been published the proposals of the official German Committee for the draft of the new Criminal Code.[1] In its Report the following details are worthy of note:

(1) " Vorsatz " is thus defined:

(*a*) Any person acts " vorsätzlich " who commits the act knowingly and wilfully, provided that he realizes, or at least takes into consideration, that his action may be wrong or illegal.

(*b*) Equal to the realization and wilful commission of the crime is the case of an actor who thinks the violation of the law to be merely possible, but, nevertheless, considers this possibility.

(*c*) A mistake is unimportant when it is the result of a mode of thinking which is contrary to the ordinary reasonable view (gesunde Volksanschauung) with regard to the question of right and wrong.

This definition deals at the same time with the problem of error. A mistake of the actor shall be deemed important when it prevents the actor from comprehending that his action is wrong or illegal. It will, therefore, no longer be a matter of importance whether the mistake be one of fact or of law; whether it be a mistake of criminal or of non-criminal law.

The conception of *dolus eventualis* has been extended by replacing the requirement of " acquiescence " (Einverstandensein) by that of " take into the bargain " (in den Kauf nehmen). By this means one seeks to embrace the cases in which " the actor, though well aware that the crime may follow, does not so much acquiesce in this result as regard it with thoughtless indifference, or believe, from sheer superstition, that it may be avoided " (p. 49 of the Report). (2) The elimination of the " Erfolgsdelikte " is proposed (p. 54). (3) The applicability of the idea of " Nichtzumutbarkeit " is limited to a great extent by the proposed new wording of the conception of " Notstand " the most important part of which runs as follows:

> A person who commits a crime in order to save himself or another person from a present and not otherwise avertible danger which may expose him to considerable harm acts in a state of Notstand (and the action is, therefore, not punishable), unless it might be expected or demanded according to the ordinary reasonable view (gesunde Volksanschauung) that he should bear the consequences (p. 63).

Klee says, with regard to this proposal: " The Committee by laying stress upon the question whether it should be expected, or demanded of a person, according to the ordinary reasonable view to bear the consequences, intended to dissociate itself from the individualistic conception of Zumutbarkeit " (p. 67).

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[1] *Das Kommende deutsche Strafrecht.* Allgemeiner Teil. Bericht über die Arbeit der amtlichen Strafrechts Kommission. Herausgegeben von Dr. Franz Gürtner, Reichsjustizminister (Berlin, 1934).

JUDICIAL PRECEDENT IN THE MAKING OF INTERNATIONAL PUBLIC LAW.

[*Contributed by* John C. Gardner, Esq., B.L., Ph.D.]

International Legislation and International Precedent.—In the appendix to his little book on *Precedent in English and Continental Law*,[1] Professor Goodhart advances the interesting speculation as to which method of precedent—English or Continental—is the more likely to be followed by the Permanent Court of International Justice in the development of international law. The answer, he says, will depend primarily upon which of the two following conflicting interests it is most desirable, at any particular time, to attain. Professor Goodhart then points out the value to the present vagueness and uncertainty of international law which would accrue by the adoption of the common law doctrine of precedent, but at the same time he emphasizes that such a fixation of international law would have to be undertaken in a cautious manner in view of there being no legislative body which can amend international case law. The latter consideration must, therefore, make the Permanent Court careful not to bind itself in such a manner that its power and authority are curtailed for the future.

It may be thought that any theories regarding the future trend of the method of precedent which will be followed by the Permanent Court in its decisions can only be the vaguest speculation, but a closer examination of the subject reveals that there are certain definite guiding influences which can enable a forecast, having, at any rate, a strong semblance of probability, to be made. Because, with the exception of treaties, the decisions of the Permanent Court are now the most powerful influence in the development of international public law, the question is not without importance and it certainly provides an interesting subject for legal speculation.

At the first glance it may appear as if the question of which method of precedent will be adopted by the Permanent Court would depend to a very great extent on whether the institution of some international legislative body is a possibility or not. But this consideration involves also the secondary questions of whether the institution of such a body is a possibility so distant that a method of precedent will have been adopted before its advent, and, if a method has been developed, whether the advent of a legislative body will influence or change it. While it is generally recognized that international public law can never fulfil, in the international community, the same functions as it fulfils in the national community, in the absence of an international legislative body, the institution of such does not appear probable in the immediate future. Sir John Fischer Williams even inclines to the opinion [1] that such a body with compulsory force is, at present, probably not desirable and that it is better, at the moment, that international affairs should be regulated with the institutions available, particularly the League of Nations.

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[1] Stevens & Sons, Ltd., London, 1934.

I do not think, however, that the institution of an international legislative body either in the near or the distant future would affect this question of precedent to any material extent. Countries such as Scotland and France, which do not follow the English method of precedent, have similar legislative institutions. Scotland, indeed, while now sharing the same legislative institution as England, has a different method of precedent. The question of legislation and that of judicial precedent are not altogether unconnected, but the real criterion appears to be whether the courts and the legislation of a country have developed concurrently or whether the development of the courts has been greatly in advance of that of the legislation. Lord Clyde attributes [2] the apparently unique English system of precedents to the vigorous legislation of Edward I, which not only restricted the scope for judicial interpretation of law, but choked with the comprehensiveness of its statutes the ground gained by the Roman law in England under Henry III. The early Scots Acts presented no parallel to Edward's legislation, as they but rarely dealt with the jural relations of subject with subject. In Scotland the ready acceptance of the general principles of the Roman Law, which were interwoven with other elements in the native customs, gave rise to a certain freedom from restraint in judicial administration, even in dealing with statutes. The early Scots law shared the common legal heritage of Western Europe—a compound of Roman, canon and feudal laws—and this heritage produced this different genius of law which, as a natural consequence, has a different system of judicial precedents from that of the English law. The subsequent imposition on Scotland and France of vigorous and extensive legislation has not altered the genius and peculiarities of their laws. For similar reasons it seems unlikely that, whatever method of judicial precedent may be adopted by the Permanent Court of International Justice, such method will be seriouslyinfluenced or affected by the institution of any international legislative body, or legislation.

The Present Attitude of the Permanent Court towards Judicial Precedent.—The Permanent Court is, of course, at present regulated by its statute, and officially every decision of the Court is only a decision in that particular case and does not constitute a binding precedent. At the same time, in view of the present vagueness of international law it is almost inevitable that the judgments and opinions of this Court are forming, and will continually form, precedents (even though not binding ones), which will to some extent be founded on and serve as a factor in the development of international law. It does not follow, either, that the present rule of the Court regarding its decisions may not in time become modified by a subsequent change in practice, and it would appear as if in some instances the decisions of the Court must constitute something very nearly resembling a binding precedent. Mr. James Brown Scott, apparently a protagonist of the English doctrine of precedent, considers [1] Art. 59 (which provides that " the decision of the Court has no binding force except between the parties and in respect of that particular case ") to be one of the imperfections of the Court's statute. Stressing the advantages of continuity of judgment, he writes : [2]

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[1] Vide *International Change and International Peace.* London: Humphrey Milford, Oxford University Press.

[2] Translator's note, p. xxii to Craig's *Jus Feudale.* Wm. Hodge & Co., Ltd., Edinburgh and London, 1934.

> Law-making is a continuous process ; law-interpreting is a continuous process ; law-applying is a continuous process. A judge, from the lowest to the highest court, wishes to justify his decision by precedent, and by a general principle if at hand or to be found. This is the general practice of all courts, and the decisions of the Permanent Court of International Justice should not be and cannot be an exception to the universal rule. . . . Notwithstanding the express provision in Art. 59 of the Statute, therefore, the jurisprudence of the Court forms a continuous body of law applicable to the relations of states. It is closely linked with a century of development which preceded the Court's creation, and it constitutes a repository of principles, rules and standards which cannot be ignored in future decisions. Of course, it cannot be said that a final stage has been reached in the evolution of international jurisprudence. As President Adatci stated in 1932, " the true rôle of the Court is not to pause in contemplation of its past achievements, but to press forward with its gaze fixed upon the future."

This question of the attitude of the Permanent Court to the English and Continental doctrines of judicial precedent is examined by Dr. Lauterpacht in his book on *The Development of International Law by the Permanent Court of International Justice.*[3] He points out that the extensive development of international law by the Permanent Court, resulting from the lack of codification, means that the decisions of the Court, almost inevitably accepted by the States immediately concerned, will possess the value of precedents, in spite of the terms of Art. 59 of the Statute of the Court. " They will be stones in the growing edifice even if in theory the builders are free not to continue to build upon them." Dr. Lauterpacht recognizes that the English doctrine of the binding force of precedent is no part of international law, but observes that, on the other hand, no tribunal can with due regard for its own authority habitually neglect its own previous decisions.

But here it becomes necessary to reflect upon the difference between the voluntary and compulsory following of precedents. Few lawyers will be so bold as to advocate the complete disregard of precedents by any court, and such disregard is no characteristic of the modern Continental doctrine. The characteristic conservatism of the lawyer wedded to the natural imitative faculty of man makes every court regard precedent to some extent, and generally follow it where the precedent is sound. The additional responsibility which rests on the Permanent Court as a law-making institution, in the absence of any international legislative body, is quite sufficient to ensure due regard for the doctrine of judicial precedent. There is little risk that the freedom and independence of decision provided for in Art. 59 of its statute will lead to a confusion of conflicting decisions and a lack of continuity of judgment. A far greater risk of injustice would exist if the Permanent Court were compelled to follow its previous decisions in every case.

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[1] Introduction, p. xiv, to Manley O. Hudson's *World Court Reports*, vol. i, Washington : Carnegie Endowment for International Peace, 1934.

[2] *Ibid.*

[3] London : Longmans, Green & Co.

One of the disturbing, and perhaps also retarding, elements in the development of public international law is the conflict between the English and Continental methods of legal thought, but I do not see any prospect of the English method of precedents and the English doctrine of *stare decisis* becoming the method of the Permanent Court. Leaving aside for the moment the question of whether the characteristics of the English method offer greater advantages to the successful development of international law than those of the Continental method, the nature of the law to be administered by the Permanent Court would seem to preclude the adoption of the English system of judicial precedents. Art. 38 of the statute of the Court provides that the law to be administered shall be the following: 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States. 2. International custom, as evidence of a general practice accepted as law. 3. The general principles of law recognized by civilized nations. 4. Subject to the provisions of Art. 59, judicial decisions and teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law, but " this provision shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto."

It seems obvious that the law to be administered by the Permanent Court does not permit the establishment of binding precedents. This is particularly the case in decisions based on equity alone. In the case of decisions dealing with the interpretation of a treaty, such decisions, if they are to constitute binding precedents at all, can obviously only be binding on the States who are parties to the treaty. There is, therefore, little analogy between decisions on treaties in international law and decisions on statutes in national law.

Comparison of the English and Continental Theories of Precedent.—The respective merits and disadvantages of the English and Continental systems of judicial precedent have already been carefully examined[1] by Professor Goodhart, who does not exhibit the usual prejudice of English lawyers in favour of the English system. The main advantages of the latter system appear to be the greater certainty and stability which it gives to the law. But the same considerations in regard to the respective merits and demerits of these methods of precedent are not necessarily applicable in the case of a legal system such as international public law, which is not only an immature system, but one which cannot be regarded from the same standards as a national system. Even Sir William Holdsworth, one of the staunchest supporters of the English legal system, recognizes [1] that " a system of case law will never be so successful as it has been in England, in the absence of the peculiar conditions in which it originated and was developed." Any expectation that the adoption by the Permanent Court of the English method of precedent would give international law a more rigid and determinate character would almost certainly be doomed to disappointment. It is asking too much of any judiciary to expect it to perform all the functions which operate in the development of national systems of law. So long as international public law remains in its present vague and immature condition the judges of the Permanent Court would never adopt a system which would involve them in the immediate declaration of binding rules of international law which they could not subsequently modify.

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[1] *Op. cit.*

> A system of law to be truly practical must be one based on a series of experiments, tested by trial and error [writes Professor Goodhart] [2]; this, however, is not the method of English law, for, owing to the doctrine of precedent, the first experiment must also be the last. In contrast to this, the Continental practice in fact is based upon experience, for this *jurisprudence* only becomes fixed if the result of the cases shows that a rule, heretofore tentatively applied, is a desirable one. There is, therefore, room for a certain amount of judicial experimentation which is impossible under the common law.

In the absence of any legislative body and until international law has developed into a very much maturer system than it is at present, it is difficult to see how judicial decisions can operate in its making otherwise than by the Continental system of trial and error.

Sir William Holdsworth considers [3] that the reservations with which, in his opinion, the English method of precedent is accompanied provide sufficient opportunities for " judicial experimentation." Speaking of the English system, he writes : [4]

> I think, in fact, that it is true to say that it hits the golden mean between too much flexibility and too much rigidity, for it gives to the legal system the rigidity which it must have if it is to possess a definite body of principles, and the flexibility which it must have if it is to adapt itself to the needs of a changing society. If it gives less flexibility than the Continental system, it also gives more certainty ; and it is generally less rigid than the enacted law.

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[1] *Some Lessons from Our Legal History*, 1928, p. 20.

[2] *Precedent in English and Continental Law*, p. 25.

[3] Case Law : *L.Q.R.* vol. l, No. 198 at p. 193.

[4] *Ibid.*

He thinks that those opinions which consider the English doctrine too strict are due to "insufficient attention having been paid to the many reservations with which the theory of the binding force of decided cases is received." According to Sir William Holdsworth, the general rule of the English method of precedent is that cases which lay down a rule of law are authoritative and must be followed. There are, however, reservations of different kinds to this general rule. Unless the importance of these reservations is realized, the nature of the authority which decided cases have in modern English law cannot be properly understood, for these reservations abate the rigour of the strict rule. There are four reservations, but I do not consider it relevant or necessary to deal with them here. They have been examined in detail by Professor Goodhart, who shows [1] that although they were effective in the eighteenth and the beginning of the nineteenth century, they are no longer recognized at the present time, and that we are left with the strict rule, unlimited by any of the exceptions which were considered essential in the past.

It would appear, therefore, that Sir William Holdsworth over-estimates the flexibility of the English system, and the historical reservations on which he lays so much stress would, on his own admission,[2] be inapplicable to any other system. Professor Goodhart points out [3] the strength of the arguments against the flexibility of English case law in comparison with the Continental system, and refers to the opposite view held on this matter by Sir William Holdsworth's predecessor, Professor Geldhart. The latter says: [4] "I do not agree with those who think that flexibility is a characteristic of case law. The binding force of precedent is a fetter on the discretion of the judge; but for precedent he would have a much freer hand."

With reference to Sir William Holdsworth's remark, in dealing with the relation between precedent and custom, that "the English method has the merit of making the custom and therefore the law certain," and that "if inconvenience arises in the future the Legislature can easily see the exact point requiring remedy, and can therefore easily make a law to fit the new circumstances," this has no application to international public law, as it stands at present. The English system of precedents undoubtedly depends to some extent for its successful working on the available corrective of the legislature. But, apart from the fact that the latter is far more difficult and dilatory of application as a corrective than Professor Holdsworth would have us believe, it is not available in the international system. And, while the question of which method of precedent is to be adopted does not necessarily depend on the existence or non-existence of a legislative body, there can be no doubt that the absence of this corrective would seriously militate against the successful working of the English method.

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[1] Case Law—A Short Replication: *L.Q.R.* vol. l, No. 198, p. 196.

[2] *Some Lessons from Our Legal History*, 1928, p. 20.

[3] *Op. cit.*, pp. 199–200.

[4] *Elements of English Law*, p. 28.

The Probable Future Method of Precedent for the Permanent Court.—Allowing for the differences between the present system of international public law and a national system, the method of judicial precedent followed by the Permanent Court is as near an approximation as may be to the Continental method. For the reasons already given, it seems unlikely that it will in the future develop on the lines of the English method. Even if international law is ultimately codified and an international legislative body established, it does not seem probable that the method of precedent in international law will ever go so far with the doctrine of *stare decisis* as the English method does. The indications seem to me more in favour of an ultimate modification of the English method, which, it must be remembered, did not always exist in its present form. Indeed, in the early stages of English law judicial precedents were not only not binding, but were sometimes even deliberately disregarded by the judges. Professor Goodhart refers [1] to the following passage in the Lord Chancellor's address at the creation of the new Faculty of Law at Bristol University in October 1933:

> No one will underrate the value of precedent. The lawyer's regard for precedent has been one of the great stabilizing forces in the State. Yet lawyers should not be hide-bound by precedent, and averse to every change. They should reflect and consider how best from their experience they can assist in reforming and improving our legal system.

This passage, as Professor Goodhart observes, seems to suggest that some relaxation of the strict common law doctrine may gradually be introduced. In his address to the American Bar Association in August 1934, Lord Tomlin referred to the attempts frequently made by the English courts to avoid following inconvenient precedents, and he thought they should be allowed to do this.

In any event, if the method of judicial precedent at present followed by the Permanent Court does alter, I think the probability is that it will go no farther than the compromise, which appears to exist in Scots law, between the Continental and English systems. Curiously enough, the position of matters in regard to judicial precedent in Scots law has never been examined and analysed, as it has been in the case of English and Continental law. It is, therefore, very difficult to give an exact and concise statement of the Scottish method of precedent. In the eighteenth century we find Lord Kames distinguishing [2] between decisions on points of form and procedure, and decisions on principle. With regard to the former, he says precedents " ought to have the outmost [*sic*] weight and authority " ; but, " as to cases which ought to be determined from principles universally agreed upon, I acknowledge that decisions ought there to have no authority. If the deduction upon which the decision is founded be fair, the decision is just; but then reason is the authority, not the decision. If the decision be founded upon wrong principles, or concludes falsely from true principles, it can signify nothing: and in these matters every man must judge for himself." A century later, Erskine states [1] that "the Courts of Scotland are not bound by the authoritative precedent of previous decisions, even by the House of Lords, but only by a uniform series of decisions in the same sense." This position is very similar to the *jurisprudence* of the French courts, but it cannot be regarded as an accurate statement of the position to-day. It can safely be said that, at the present time, the Scottish courts do, in practice, regard precedent as of much greater importance and authority than is the case on the Continent. While, generally speaking, individual precedents are perhaps not in theory *absolutely* binding to the same extent as in England (except the decisions of courts having jurisdiction in error, and which decisions are probably binding on inferior courts as much on account of the appellate jurisdiction as on account of the doctrine of *stare decisis*), the *ratio decidendi* in all cases involving a legal rule or principle is almost invariably based on an examination of previous decisions. There are even instances of the Court of Session having deliberately made law by a single decision,[2] which was intended to be a binding precedent for all time. There is certainly ground for argument that, in practice, the attitude of the Scottish courts towards the binding nature of judicial precedent is now very much the same as in England, but there is very recent authority[3] for the view that a Scottish court of first instance is not bound by its own previous decisions.

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[1] *Precedent in English and Continental Law*, Appendix, p. 55.

[2] Preface to *The Decisions of the Court of Session from its First Institution to the Present Time, abridged and digested under Proper Heads in Form of a Dictionary*. Edinburgh, 1741 (in 2 volumes by Lord Kames).

Lord Macmillan, in his "Proposals for the Formation of a Scottish Legal History Society," describes the Scottish legal system as being the only instance of the combination in theory and practice of the Civil Law and the Common Law—the two great rivals for supremacy in the legal world. While "it has drawn its inspiration largely from the law of Rome," it also "shares the respect for precedents distinctive of the Common Law." In a paper on Scots law read to the General Assembly of the Society of Comparative Legislation in Paris on February 16, 1924 (a translation of which was published in the *Juridical Review*, vol. xxxvii, p. 370), Professor Lévy-Ullmann goes so far as to say that "Scots law as it stands gives us a picture of what will be some day (perhaps at the end of this century) the law of the civilized nations, namely a combination between the Anglo-Saxon system and the Continental system."

There has certainly been a tendency in Scots law in the last century to lay a much greater stress on the authority of precedent than was formerly done, and I understand that a similar tendency has more recently been manifested, but to a less degree, in the French legal system. In England, on the other hand, the most recent tendency seems to be towards a relaxation in practice, at any rate, of the strict rule of binding precedents. National tendencies cannot, of course, be regarded as reliable criteria for international public law, but they are the only indications available for a system which is so far behind national systems in its stage of development. The conflict between the Anglo-American and Continental legal systems in international public law seems likely to result in the compromise at present shown by the Scottish system, so far as judicial precedent is concerned at any rate. It accordingly seems reasonable to assume that if the present method of precedent adopted by the Permanent Court does alter it will not go farther towards the English system than the compromise exhibited by the Scottish method. Such advantages as are offered by the English system appear to be more than offset by the disadvantages of being shackled by obsolete or faulty decisions, for which in an international system there is not even the curative of legislation.

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[1] *Institutes of the Law of Scotland*, 1871 edition, p. 21.

[2] *The Ministers of the Parish of Tingwall* v. *The Heritors*, 1787, Mor. 7928.

[3] *Sugden* v. *H.M. Advocate*, 1934, J.C. 103. In this case, which dealt with the question of prescription of crime in Scotland, it was held by a majority of judges that a full Court of Justiciary was not bound by a previous decision of that Court, even when given by the whole Court.

Regarded as a law-making factor, the English method probably exercises a stronger influence. At the same time, the extent to which the inherent conservatism of lawyers causes precedents to be founded upon, consciously or unconsciously, in a system in which they are theoretically regarded as in no way binding, nor even as examples which should be taken into consideration, can scarcely be over-estimated. But there seems little doubt that the English method cannot be regarded as the most suitable one for the making of international public law.

THE TACTIC OF PROGRESS IN INTERNATIONAL GOVERNMENT.

[*Contributed by* Pitman B. Potter, Esq., *Professor of International Organization, Graduate Institute of International Studies, Geneva.*]

Both the proposal for an international police agency now put forward by certain reform agencies and proposals for an international tribunal of equity intended to serve as an agency for revising or altering existing territorial and other arrangements in the international *status quo*, put forward from the same quarter, raise a rather fundamental, certainly an important, but also a very highly technical, problem in the science and art of international government. They raise the very practical and also the very idealistic question of the best method or tactic to be adopted for promoting progress towards more and better international government. Is the making of such proposals the best means to that end ? And what, exactly, is the nature of such proposals, viewed in terms of the mechanics and dynamics of the process of organized international control ?

To attempt to answer the last question first, it may be said that such proposals constitute efforts to have set up by the nations institutions or devices vested with powers to do, without further instruction or control, certain things while public opinion and state policy in those nations do not seem to be yet ready to do, directly at least, the things in question. International police action and revision are both needed, in the judgment of detached scientific students of international affairs, and in the minds of the reformers. But neither the peoples nor the governments seem ready to undertake these tasks by direct, candid, immediate action. It is then proposed to entrust such action to agencies to be created for the purpose, which may, perhaps, because of their character, perform such action more skilfully than the governments acting directly, but whose chief claim to support will be that they do it at all.

This is not an uncommon trick. As a matter of fact it is the trick of getting ahead of opinion and policy everywhere by the setting up of governmental machinery and procedure. It is the trick of the dictatorship to get ahead of democracy. It is the manœuvre designed to induce individual nations which are backward about participating in international co-operation to do so via courts or conferences which look harmless on the surface, but which involve more involvement, so to speak, than at first appears. It is the device of getting countries into conference in order to get a convention in advance of their existing policies and practices. It is particularly in evidence in the action of (if possible) setting up an expert commission to deal with opium traffic or mandates or armaments with as much discretion as it can manage to exercise without being pulled back or pulled down by the governments. It is even involved in that holy "creative juristic thinking" so reverenced by the higher school of legal thought—which amounts to nothing more than the action of judges in so interpreting existing law as to obtain results more important and more elevated in character (in the minds of the judges) than those intended by the legislators. It is just possibly the generic problem of institutional government in all its phases.

Needless to say, this trick is a feature or a function of the theory of or belief in the inequality of men and groups of men. People and nations being inclined to hang back in the development of social organization and control must be led or duped into such progress by the dictator, the reformers, the judge. This may all be very true—the writer believes that it is—but it should be kept clearly in mind for what it implies.

Alternatives to such a proceeding are to educate the people and the nations, slowly if need be, until they are ready to take right action without having it done for them, over their heads or behind their backs, in this fashion, or even to let them suffer as a result of their stupidities and ill-will until they come to their senses and are willing to take progressive action. Even in the latter case, however, education or at least leadership is needed, for in their absence the sufferers are likely to become desperate and confused and draw wrong conclusions from their plight and wildly adopt wrong remedies. But this is a long process, and hence the resort to the short cut.

Obviously the main problem to be considered here is that of the possibilities of such a tactic, its dangers, and the conditions necessary for its successful operation.

It would seem that the possibilities of success by this tactic turn to some extent upon the subject-matter involved, to some extent upon the character of the personnel employed and to some extent upon the stage which has been reached in the treatment of a given subject.

Thus, to work backwards again, if a subject has already been given a great deal of attention and treatment, the principles for its treatment pretty well defined, the fears and rivalries felt in respect to it pretty well allayed, it is not likely to be difficult to secure establishment of an agency to proceed with the work. For now the work will consist chiefly of administration, in the strict sense, or the application of already settled law, with relatively little discretion left to be exercised. But this is not what sponsors of the sort of action under consideration here have at heart. They want to see bodies set up above the heads of the people and the governments to act with a good deal of power and discretion, to exercise what is in effect legislative power back upon their creators. And just in proportion as the problem at issue is still highly political and unregulated, just so will it be difficult to get the desired action taken.

So for the type of personnel employed, although here a curious contradiction appears. If the persons put forward for the task of regulating or dealing with some problem which the existing facilities of government have not succeeded in handling effectively are politicians or persons representative of group or national interests, the proposal to allow them to deal with a given matter is likely to fail because of fear of deliberate discrimination and favouritism. On the other hand, if it is proposed to entrust the matter to detached scientific experts—sanitary engineers, for example—there may be almost as much mistrust because of fear of action which shows no consideration for the individual or group interests involved but operates solely with the social end in view ! In either case there is likely to arise a demand for subjecting the agents to restraint or even instructions to prevent them from acting too independently in the discharge of their functions.

Finally it is obvious that securing the remission of a problem or problems to such an agency for treatment will depend on whether the subject is regarded as being of crucial importance or not, though again this may operate in two ways. Thus a seemingly unimportant matter such as the scientific classification of the causes of death, for example, although of great practical importance in the insurance world, might well be handed over to an international commission with little hesitation. On the other hand, matters such as customs duties and territorial boundaries would not be ; this would be all the more true where the action to be taken is of a legislative or definitive kind, rather than merely that of studying or advising, or applying existing law, as has already been pointed out. But, to push one stage farther, if the matter is not only very important but very urgent such a reference to a superior body with power to act might be made out of desperation.

Now all this does not mean that this particular trick cannot be put across on the people or the nations ; much existing governmental organization and practice testifies to the contrary. But it does mean that the conditions just suggested must be borne in mind and certain serious dangers duly considered also. If these conditions and dangers are observed with sufficient care, the people and their governments may be fooled or persuaded into taking the action desired.

The principal thing to be avoided is any effort to secure the setting up of an agency with powers so far ahead of what current opinion and policy support that it will not be sustained or even tolerated or its actions respected when it begins to function. Such an establishment may be achieved by high-pressure argument and propaganda in time of crisis, but the subsequent reaction is almost certain to damage the cause of progress in governmental organization and practice beyond what would have been the case if the particular trick in question had not been tried. Even if the institution survives, to serve as a goal to which society may slowly grow up, it cannot be as effective as though it had been created with a little less pretentiousness and artificiality.

It may be said that the very campaign to secure the setting up of the agency in question is a campaign of education such as, presumably, opponents of premature advances in this direction would advocate. This, of course, is true, but it remains true that if this education—education to the point of being willing to create the institution in question—has been forced too fast or too superficially, it will not, so to speak, stick. Moreover, educating by the promotion of a special device inevitably results in bestowing too much attention, pro and con, upon that device and its details rather than on the fundamental principles involved. Herein is also implied the most important lesson to be learned from all this analysis. What is especially needed in any such situation or movement as those here discussed is a continuation of the educational process beyond the time of setting up the institution so that it is sustained and used wisely and respected afterwards. It might be added that if this is done it will matter little whether the institution set up has been freed from the shackles of subsequent control and authorized to deal dictatorially with the matters referred to it or not, just as, per contra, if this is not done it will likewise matter little whether the institution has been given great power or not, for even a dictatorial agency will probably fail in that case.

Applied to the proposals for an international police board and an international equity tribunal to revise the *status quo*, these principles should give interesting results. It appears to the writer that the former proposal is so far ahead of current opinion, as evidenced by the fate of the co-operative sanctions system in the Covenant, that there is little or no chance of getting it adopted, and that if it could be put across as the sanctions system of the Covenant was put across, it would collapse in operation. He is a firm believer in the soundness of the principle of sanctions, including military action, and says this only because he is convinced that the peoples and the governments generally are not. So for the equity tribunal; if the privileged nations will not permit the mild revisionary machinery of the Covenant to operate, how can they be expected to permit the creation of a more effective system or to permit it to function and respect it afterwards ? And again the writer is a firm believer in the soundness of the principle of revision, and says this only because he is convinced that the peoples and the governments generally are not. That individual national communities have been willing to set up police forces and equity tribunals (with, incidentally, extremely minute powers of revision of existing rights in comparison with what is proposed for the international tribunal !) merely suggests that the international community is still very backward in social solidarity, not that it is ready to do any such thing itself.

Does this mean that nothing is to be done about either international security or revision ? Obviously it means nothing of the sort. It means, if anything, that what is to be done must be of an even broader, deeper, stronger and more significant character than advocacy of particular trick schemes for solution of these problems. The moral responsibility of particularly Great Britain and America must be awakened in connexion with the first problem, so that these nations, whose moral and material weight is indispensable if the other nations which have been loyal to the principle of international community solidarity are to be able to make that principle effective, will be ready to take their true part in world pacification. Then neither the rudimentary character of the machinery of sanctions in the Covenant nor the current anarchistic and atavistic viciousness of certain other nations which shall and should be nameless will count for very much. And such respect for the interests of others and the claims of justice and peace and harmony in the international community must be awakened on the part of certain nations seriously charged with holding unjust privileges under existing treaties, by either persuasion or pressure (in connexion with the development just advocated and as a price of its accomplishment), that they will consent to submit to re-examination of their rights in seriously contested cases. Then the rudimentary character of the revision process in the Covenant will not matter. But neither of these problems, deeply moral and political as they are, can be safely solved by trick devices or artificial if not superficial promotion tactics.

THE INTERNATIONAL COMMUNITY.

[*Contributed by* ØYSTEIN HEGGSTAD, ESQ.]

IN the Report of the Thirty-seventh Conference of the International Law Association, held at Oxford in August 1932, we found a section of some thirty pages devoted to the subject of codification. It is upon this section of the Report which I wish to dwell.

Proceedings at the Conference.—The Association appointed a committee, with Dr. A. Alvarez, Paris, as chairman, and having as members lawyers from England, America, Germany, Sweden, etc. Its task was to prepare the ground for a future Convention regarding the fundamental principles of the new international law. The committee divided itself into two sub-committees: one (first sub-committee), under the chairmanship of Professor A. de La Pradelle, entrusted with the task of considering the work done by the Hague Conference in 1930, with a view to a report on the best method of codification ; the other sub-committee charged to consider and report on a draft drawn by the chairman.

At the final meeting of the whole committee in February 1932, at which the sub-committees submitted their reports, it was resolved that the chairman's draft declaration should be discussed in co-operation with the Institute of International Law, the Union Juridique Internationale, the Diplomatic Academy and the American Institute of International Law.

It was, however, strongly urged by Judge Caloyanni that the declaration should not be adopted at that meeting, as the question was not yet ripe. As a result of this protest the declaration was not put to the vote, and only one resolution was adopted, to the effect that the meeting recognized the great interest involved in drawing up the general principles of international law, and urged the committee to continue its work with a view to the formulation of a text giving expression to these principles, in co-operation with other institutions which have as their object the promotion of international law.

Draft Declaration.—The fundamental rules of international law are at present in a somewhat chaotic state, and this confusion leads to the result that the scientific treatment of the fragmentary law proceeds very slowly. The object of the draft is to set forth clearly the main principles. Its title is: *Projet de déclaration sur les données fondamentales et les grands principes du droit international de l'avenir.*"

It is divided into nine chapters, consisting of fifty-four articles in all, and is followed by two *Vœux.*

Only one point in the declaration will be discussed here, albeit a very important one, namely " The International Community."

Mention is made of this in the first heading: *La nature de la Communauté Internationale et les éléments qui regissent les Rapports entre ses Membres.*"

Provisions of the Declaration, as to International Community.—I now proceed to recapitulate very briefly the chief provisions of the Declaration regarding the International Community.

Art. 1: The fundamental basis of the relations between the members of the International Community is mutual dependence.

Art. 2: This mutual dependence of the individual interests of the members begets a general and higher interest. It creates in these members a common aim, and consequently duties, not only as between the members, but also in relation to the International Community.

Art. 3: The International Community ought to be organized in such a way that it secures for the members harmonious co-operation.

Art. 4: The organization of the International Community ought to be extended to all forms of the life of nations: political, economic, social, intellectual and administrative. It must be local, continental, mondial.

Art. 20: Every state, recognized as such, has an international personality: it is a politically independent organism, and different from the individuals composing it. In this character it is a member of the International Community and subject to international law.

Art. 21: The state is sovereign. The sovereignty ought only to be exercised as far as the state is master of its territory, where it has itself the right to rule, give laws within its borders, freely enter into intercourse with the other states.

In the exercise of this the state is always subject to international law, and especially to the limitations imposed in this Declaration.

Art. 34 contains various instructions which the states ought to observe, including: (*h*) Unite in exertions for precluding, preventing and if necessary stopping war. (*j*) Participate in the creation, administration and development of all international public services; likewise in the organization of measures of a humanitarian and sanitary nature.

Art. 35: In the exercise of their duties and in the enjoyment of their rights the states should be impelled by the idea that their joint aim must be that of promoting human happiness.

Art. 52: The mondial court for all members of the International Community is the Permanent International Tribunal.

Art. 53: Any member of the International Community whose right is infringed by one or more of the other states is entitled to have recourse to the competent international tribunal.

Vœux.

1. Just as an international tribunal has been created for settling conflicts of a judicial character, so it is highly desirable that there be created large councils designed for consideration and for arbitration for the purpose of settling or removing conflicts of a political nature.

2. It is desirable, especially in the civil arrangement of business and work, that between the members of the International Community there should exist a certain uniformity in legislation.

I have taken the liberty of quoting the provisions of this draft both because the International Community is of such enormous importance for the future development of international private and public law and because the International Community is the central question in the future order of the world. Everybody is familiar with the way in which the world's development during the last decades has made an immense movement forward in technical respects. Human beings have, as a result of new inventions and their exploitation, as it were, suddenly been brought closer together ; the relations of time and space have wholly changed their character ; at the same time the reciprocal relations of dependence as between human beings and the state and between one state and another have come strongly into the foreground.

It is unnecessary here to point out in greater detail how the technique of war, by taking into its service inventions and modern science, has likewise developed during and since the War. We know that any future great war will be far, far worse than the last. We must be prepared for the possibility that another war of any great extent will bring our civilization into the greatest peril, as was emphasized by Lord Blanesburgh in his inauguration speech at the International Law Association's meeting.

An Organized International Community.—The remedy against this imminent danger for humanity is an organized International Community. It will be lawyers who in the first place will be called upon to solve the problem of making war impossible ; and otherwise of promoting general human interests by a world-wide state organization. The task affects the deepest interests of humanity, and it must therefore be attacked at once and earnestly. At a time when speeches given by leading persons can be heard all over the world, and psychological and administrative technique are so enormously developed, there is no ground for hesitation on account of the greatness of the task. It is not a Utopia, but a necessary piece of work which lies before us, and one which appeals to our best instincts. It is necessary to look the difficulties in the face : the struggle for power between the great state-groups, the reluctance of the states to relinquish any part of their independence and the constitutional difficulties connected with doing so, are the greatest of these.

That a strong and lasting organization of states can be realized by voluntary means is evinced by the history of the American states since the meeting at Philadelphia in 1787.

I desire further to point out that in all countries there are now trained lawyers, free from prejudice, who have acquired an understanding of the nature of the task and have the qualifications requisite for bringing the question to a solution, and who also within their field of labour are working for its realization. The declaration which has been drawn up by the committee appointed by the International Law Association is a considerable and praiseworthy piece of work. In brief and concise expressions it formulates the fundamental rules and principles of international law, as they are and should be in the view of the authors. At the same time the declaration points beyond the present and into the future. It ought to gain the support of the international legal organizations in all countries where it is now under discussion. One remark, however, appears to me necessary. The declaration is in one respect too weak, namely in its indication of the lines for the building up of the International Community as an organization. This is dealt with in Art. 4 and the first *Vœu.*

Legislative and Executive Powers Essential.—Since the lines of direction are here to be stated, ought not the essential point to be made clear, namely that a legislative and executive world organization by the side of the judicial is to be desired ? Such an assembly, furnished with executive powers, would possess sovereignty, but its sphere of authority would be confined to those areas only which affect the mutual common interests of all states. Now that we have the judicial power in international disputes, it is natural to express a desire for the creation of the two complementary organs, which fulfil the aims of the judicial power and give the states assurance that judgments will be effectual and give a guaranty against arbitrary conduct on the part of states which may threaten the existence and development of other states.

It should be possible to express the desire for such an organization the more certainly seeing that the states thereby in reality relinquish none of their independence—such relinquishment is only apparent. In reality they *gain* in independence, since the destructive dangers which threaten the nations by the present chaotic state of international legal relations are thereby diverted. By the solution of this question the question of disarmament and reduction in armaments would be solved also ; and a basis be given for a settlement of the world's economic problem. The dangerous social unrest in other spheres would also be allayed, without loss to the states of their right of determination with respect to their own constitution. The first *Vœu* might then take this form :

> Just as there has been created an international tribunal for the settlement of conflicts of a judicial character, *it is highly desirable that an international representation be created, with delegates from all countries in the International Community, furnished with legislative power on questions which relate to the vital interests of the International Community, in respect of which it obtains sovereignty, and furnished with executive power.* It is also highly desirable that there be created councils designed for deliberation and arbitration for the purpose of settling or removing conflicts of a political character.

As will be seen, this *Vœu* will be a further expression of the idea contained in Art. 4.

There is no reason why at the present stage of the world's development the creative powers in the sphere of international law should hesitate to express such a desire in the declaration, and it may very well be that this ought to be considered and proposed by the individual groups for inclusion in the joint declaration.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

Western Australia and Secession.—No one outside Western Australia, in all probability, expected that it would be possible for the Imperial Parliament to give effect to the petition of the State for the power to secede from the Commonwealth. But it was possible to argue, as was done before the Joint Committee of the Houses of Parliament,[1] that the petition was one which should be received by Parliament on the ground that the prayer thereof was one which could legally be granted effect by Parliament and by Parliament alone. On this point the view of the Committee is of special interest ; it has been contended from time to time in the Commonwealth that the power of change of the Constitution is unrestricted, provided that the manner indicated by the Constitution is duly observed, and that it is within the competence of the constituent authority to dissolve the " indissoluble federal Commonwealth under the Crown " which it was the intention of the Act of 1900 to create. But the Committee has definitely adopted the view that no such power exists, and that, if dissolution should ever become necessary, it must be effected by the Parliament of the United Kingdom. But that Parliament could only act on the definite request of the Commonwealth of Australia conveying the clearly expressed wish of the Australian people as a whole. The constitutional conventions of the Empire forbid action on any other basis, and it was ruled impossible to receive a petition whose subject-matter did not fall within the sphere of State authority and which asked for action without the jurisdiction claimed by the Imperial Parliament. The ruling is of special interest in its bearing on the alteration of the Constitution of Canada, and it can be adduced to strengthen the case of those who argue that change of fundamental character in that Constitution could not be effected at the request of the federal Parliament unless it conveyed the clearly expressed wishes of the Canadian people as a whole. The point is of importance, in view of the opinion which has found some supporters in the Dominion that the Imperial Parliament would be bound to alter the distribution of powers in the Dominion, if the federal Parliament by a clear majority in both Houses asked for change. So far as the opinion of a Committee, which was not questioned by any substantial body of opinion in either House, is of importance, that view must be ruled to be contrary to the doctrine of the present and probably of future Parliaments.

[1] House of Lords Papers, 1934–5, Nos. 62, 75.

The Abolition of the Criminal Appeal from Canada.—As anticipated, the Privy Council in *British Coal Corporation* v. *The King*[1] had no difficulty in affirming the validity of the section of the Act to Amend the Criminal Code, 1933, abolishing the appeal from Canadian courts in criminal cases. Any other decision would have been to destroy the effect of the Statute of Westminster, 1931, and the work of the Imperial Conference of 1926. The part played by Canada at that Conference was in considerable measure determined by the decision of the Privy Council in *Nadan* v. *The King*,[2] which determined that the Dominion Act [Criminal Code, s. 1024 (4)] which attempted to cut off criminal appeals to the Privy Council was invalid. The Act there declared ineffective had an historical origin. It represented the reaction of the Dominion to the hearing by the Privy Council of the appeal in *Riel's* case.[3] The great political disadvantages of the intervention of the Privy Council in that issue naturally evoked the determination to shut out the appeal, and the British government of the day acquiesced in the measure then passed. That it was ineffective in law was not recognized until later, and was only affirmed in *Nadan's* case. The grounds there adduced were the fact that the Judicial Committee Acts of 1833 and 1844 (the latter being clearly in point) gave a right to hear appeals which no colonial legislation could bar, and that, apart from this, the appeal which was allowed in London in the United Kingdom could not be barred by any statute which had not extraterritorial operation. Now it was part of the purpose of the Statute of Westminster to remove both these limitations of Canadian power by freeing Canadian Acts from the control of the Colonial Laws Validity Act, 1865, and by authorizing Canada to give her Acts extraterritorial validity. In these circumstances Canadian lawyers naturally held that full power to abolish the appeal had been conceded, and for once Quebec was found in accord with the Dominion in contending for the validity of the exercise of federal power. So also the Privy Council has now held. It is indeed hard to see any substance in the grounds adduced against the Act. The contention seems to have rested on a revival of the sanctity of the prerogative as something which nothing but the Imperial Parliament could affect. Yet from very early days colonial legislatures have dealt authoritatively with prerogative powers ; indeed it is proper and natural that prerogative as regards a colony should thus be regulated,[4] and, when the Queen assumed control of India, the Indian legislature was forthwith assumed to have power to bind the prerogative under its general authority ; its predecessor under the company had been specifically restrained from doing so.[5] The real difficulty was obviously the question of extraterritorial effect, and the treatment of this issue by the Privy Council is very interesting. The power to give extraterritorial effect to legislation means normally that Canadian courts can punish actions forbidden by Canadian law if committed, *e.g.* in England, through the instrumentality of the Canadian courts. But it does not mean that Canada can make such actions illegal under English law and punishable there. Canada cannot affect appeals in British courts proper. But the Privy Council solved the issue by pointing out that the reception and hearing of the appeal in London was only one step in a composite procedure which began and ended in Canada, matters ancillary to a cause essentially Canadian, and that the appeal to the King in Council is an appeal to an Imperial, not merely a British tribunal. That the decision is sound cannot be questioned, but the difficulty felt justifies the regret that the Conference of 1926–30 did not attempt seriously to define the extent of Dominion extraterritorial authority.

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[1] 51 T.L.R. 508. [2] [1926] A.C. 482. [3] 10 App. Cas. 675.

[4] In the early colonies Bills affecting the prerogative were often passed, but disallowed.

[5] 3 & 4 Will. IV, c. 85, s. 43.

On an historical point the judgment is misleading. It is asserted that, while petitions for redress of wrong decisions in English courts went at first to the King, then to the King in Parliament or the King in Council, petitions from the Channel Islands went to the King in Council. This ignores the fact that, as Anson[1] pointed out, petitions originally were addressed to Parliament in the case of the oversea territories as well. The real point is that in England the influence of the supporters of the common law succeeded in eliminating appellate jurisdiction by the Council, while petitioners from overseas had no such interest involved and were driven by the intermission of Parliaments under the Tudors to desire the action of the Council. It seems also that the real reason for the sections of the Commonwealth Constitution (s. 74) and of the South Africa Act (s. 106) dealing with the prerogative appeal has been overlooked. Owing to the Act of 1844, it was essential, if power to limit such appeals was to exist, to deal specifically with the issue ; it had nothing to do with any special potency of the prerogative to hear appeals, but with a definite statutory power. It is curious that the importance of the statute of 1844 should be so ignored, for it is itself a statutory declaration of the validity of local Acts barring the prerogative appeal except from the final courts of the colonies.

The Abolition of the Appeal from the Irish Free State.—In this case also the Privy Council has confirmed the view that the abolition of any form of appeal from the Irish Free State was within the powers of that Parliament, but its judgment[2] is of special importance, because the Council preferred not to take advantage of easier modes of disposing of the issue, but decided it on grounds of a most far-reaching character. Accepting the view that the appeal was implicit in the treaty—which of course is silent on the issue—as the Council ruled in *Performing Right Society* v. *Bray Urban District Council*,[3] it would have still been possible for the Council to hold that the extension of the powers of Canada by the Statute of Westminster applied equally to the Free State, since it is not disputed on any hand that the assimilation by the treaty of the Irish to the Canadian Constitution was intended to cover the extension to Ireland of all powers of Canada. It is true that the decision in the case of Canada applied only to the criminal appeal, the civil appeal not being there involved, but it is clear that, whatever the powers of Canada as a federal state in that regard, the position of the Free State as regards the civil appeal could easily have been assimilated to its position regarding the criminal appeal.[1] But the Privy Council preferred to rest its decision on the broad ground that the only restrictions on Irish legislative power were those imposed by the Imperial legislation giving the force of law to the Constitution, and that, since the Statute of Westminster, the Irish Free State legislature had absolutely unfettered legislative power. It thus declined to accept the view of the Supreme Court of the Free State, which in *The State* (*Ryan and Others*) v. *Lennon and Others* [2] had held that the legislature was bound by the Constitution which created it, and therefore could enact nothing which was forbidden by the Constitution. The view of the Irish court was, of course, perfectly natural, for Irish judges are sworn to uphold the Constitution, and the Constitution was framed by Irishmen who constituted themselves a constituent assembly and prepared a Constitution which they intended only to be capable of amendment on terms laid down therein. The Irish court would no doubt have held that the appeal was not an entrenched part of the Constitution, but was alterable by the Parliament, since in the Irish view it forms no part of the treaty and all of the Constitution may be altered under its terms save if such alteration violates the treaty. The appeal, therefore, must be held both under English and Irish views to be abolished. But the English view as taken by the Council regards the abolition of the oath prescribed by the treaty as valid, while the Irish view if consistently applied would deny its validity. The position is extremely interesting, for the Irish courts, of course, are not bound by the Council's judgment. It may, however, be surmised that they will hesitate to deny to the Parliament the plenitude of authority which the Privy Council has assigned to it. The importance of this point is very great, for the presence of British forces in the State has hitherto rested on legislation which the Free State Parliament can now repeal at pleasure, and the President of the Council has emphasized the incompatibility of the existence of British authority on this head with the establishment of friendly relations between the Free State and the United Kingdom. Fortunately the existing law remains until expressly altered and action in this sense is not announced.

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[1] *The Crown* (ed. Keith), ii. 321.

[2] *Moore and Others* v. *Att.-Gen. for the Irish Free State*, 51 T.L.R. 504.

[3] [1930] A.C. 377, 395, 396.

Parliament and Treaties.—The Privy Council judgment is open to one criticism in point of expression.[3] It speaks of the power of the Irish

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[1] Cf. *Journ. Comp. Leg.*, Third Series, vol. xvi, pt. i, pp. 137, 138.

[2] Cf. Keith, *Letters on Imperial Relations*, 1916–35, p. 157.

[3] Mr. Lemass, on September 13, interpreted the judgment as denying the binding force of the treaty, and announced the passing of legislation at an early date to make the Constitution republican.

Free State Parliament to pass an Act abrogating the treaty, phraseology which confuses the functions of the executive and of Parliament. Neither in English nor in Irish law is the power to make or to abrogate treaties conferred on the legislature, nor is it desirable that it should be so conferred. The function of the legislature is to enact measures which remove obstacles, if any, existing under law to the full carrying out of the treaty, and it can of course neglect this duty or pass legislation which runs counter to the obligations of the country under existing treaties. The Free State Parliament has, in fact, in the Constitution (Removal of Oath) Act, 1933, removed from the Constitution the taking of an oath which is part of the treaty, and it has deprived the executive of the power to enforce that section of the treaty. But it had not even purported to abrogate that or any other section of the treaty, and in abolishing the appeal it is very probable that it had not gone beyond the right of the State under the treaty. The Council itself was careful to disclaim expressing any opinion on that issue of contractual right. Should, however, it be decided in the Free State to deal with the position of the Governor-General, a different position would arise.

The Governor-General in the Irish Free State.—In fact the position of this officer has now been reduced to the bare function of signing the Acts of the State, and it was natural that the opposition [1] should have challenged the continuation of expenditure on an office so devoid of meaning. But it declined to accept Mr. de Valera's request for co-operation in securing its abolition, defending the employment made of it under Mr. Cosgrave's regime. It is impossible to hold that the present treatment of the office of Governor-General accords with the spirit of the treaty, and there might be advantage in its abolition as unnecessary and in the performance by the King in person or through a Commission of the act of assent to Irish Acts. The King already acts personally in foreign affairs requiring his signature, as when recently diplomatic relations were established with Spain, and, as non-assent to Dominion Acts is obsolete, the King could easily give standing authority to the Chief Justice to assent on his behalf. Such an arrangement could be provided for in a supplementary treaty, and it certainly seems far better thus to adjust the issue than to leave the matter to be settled by unilateral Irish action involving a clear and indisputable breach of the treaty of 1921.

Dominion Neutrality.—The question of the right of a Dominion to remain neutral in British wars continues to occupy attention in the Free State and the Union. General Hertzog in the Union has now explained [2] the grounds on which he maintains that he could give full effect to the agreement of 1921 with the British Government for the defence of Simonstown without derogating from the obligation of neutrality. The government of the Union by that accord assumed definite obligations to keep the naval base in a defensible condition and to aid in repelling any attack

[1] Dáil Debates, May 28, 1935.

[2] House of Assembly Debates, 1935, pp. 1765 ff.

thereon in war time. Admittedly when the accord was reached, it was not contemplated that the Union would wish to be neutral in a British war, but it is contended by the legal adviser [1] of the Prime Minister that the agreement can be deemed consistent with neutrality. The analogy relied on is that of Spain and Gibraltar. The British rights over Gibraltar do not involve Spain in war when Britain is at war. The objection, of course, is that Spain is under no obligation to keep Gibraltar in a state of defence or to aid in resisting attack on it. It is argued, however, that there is precedent for the lending of aid by one power to another under prior treaty obligations without breach of neutrality, and that is still the doctrine of international law. It is impossible to hold this view sound. It is true that in 1788 Sweden was prepared to admit that Denmark could lend armed aid to Russia under a treaty of 1781 without breach of neutrality if she observed strictly the limits of the treaty, and that in 1826 Canning justified aid to Portugal against Spain by old agreements. But all modern authority, including that of Hall, Westlake and Birkenhead,[2] denies that such a doctrine could now exist, and it is impossible to believe that any Court of International Justice would accept the plea; still less would any foreign power respect the neutrality of the Union in such an event. Mr. de Valera's view is in accord with modern views, for it is in his opinion a grievance that the defence provisions of the treaty of 1921 preclude effective neutrality. From the constitutional point of view, on the other hand, strength is given to General Hertzog's claim of the legal right to proclaim neutrality by the Privy Council decisions above discussed, for they seem to establish that any royal prerogative in respect of a Dominion may under suitable legislation be controlled by that Dominion.

The Dominions and the Royal Jubilee.—By a departure from precedent the occasion of the King's Jubilee was not taken to secure the holding of a meeting of the Imperial Conference, already overdue, as the last meeting was held in 1930. In any case Mr. de Valera might have found difficulty in attending, but the position of the Prime Minister of Canada was a decisive factor. Mr. Bennett's government had markedly lost ground, and strong exception was taken by the Liberal opposition to any action which might tie the hands of the Dominion in the event of a Liberal success at the general election due this year. To this constitutional objection weight was later given by the sweeping Liberal victories in Prince Edward Island and New Brunswick, while rather later the Alberta results revealed the growing strength of a new Social Credit movement. The absence of a formal Conference, however, was no barrier to discussion which resulted in a tardy accord with Australia and New

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[1] Opinion of February 15, 1935, adopted by the Prime Minister, March 18. I am indebted to Mr. C. W. A. Coulter, M.P., for a copy of this opinion, which General Hertzog has generously made available to his critics.

[2] Their dissent is admitted, and no authority in favour of the view adopted is adduced from modern jurists.

Zealand on imports of meat into the United Kingdom. On foreign affairs and defence as usual no commitments by the Dominions were asked for, but a full explanation of British policy evoked expressions of sympathy—reasserted in September in the Ethiopian crisis[1]—with the ideal of collective security and of approval of the decision to strengthen British defence forces ; Australian reactions were seen in the announcement of increased expenditure, but the resumption of compulsory service was not adopted. Of some interest was the assurance given on May 29 for the Irish Free State that in no event would the Free State allow use of her territory by enemies of the United Kingdom, a view naturally homologated by the other Dominions. Presumably the point of what at first may seem a needless assurance is that, even should the United Kingdom violate League obligations and be exposed to sanctions by order of the League, the Dominions would feel exempted from action against the United Kingdom. This is in harmony with the general principle adopted by the British government that the League Covenant is not binding for inter-imperial relations.

The Crown and Cession of Territory or Rights of Protection.—The controversy over Ethiopia led to a British offer to cede to the Emperor, in order to enable him to make terms with Italy, a strip of Somaliland giving access to the sea. Some misunderstanding arose on the offer. It seems to have been held that it was not necessary to obtain His Majesty's assent before the offer was made, but this view is clearly constitutionally unsound. His Majesty's right to be informed of every important step in foreign politics is absolute and has never been challenged since the days of Lord Palmerston. Confusion also arose regarding the position of Parliament, the Colonial Secretary being under the impression that the question was one of cession of British territory, to which the Heligoland precedent of 1890, and those of Jubaland in 1925 and the Dindings in 1934, applied. In fact, however, the territory in question is not British, but is subject to British protection. It is difficult to see any legal basis for the right to transfer a protectorate of this kind to another power. It was admitted that the natives concerned should at least be consulted, and presumably Parliament would have been asked to approve if action had been taken. The refusal of Italy to make any concession removed the possibility of proceeding with the project.

The Union and the Native Territories.—This issue raises great difficulties and it proved impossible for the Union to ask for or to be offered the immediate transfer of the native territories from British to Union control. It is plain that the terms of the schedule to the South Africa Act, 1909, are now incapable of operating as was intended when they were framed. The Union Parliament is absolutely sovereign, the right of secession is claimed, and disallowance of its legislation is impossible. To transfer the territories without the assent of their populations would be as illegitimate as to place the Indian states under the control of a British Indian government. It is therefore fortunate that it was found possible to adjust conflicting views by agreement on co-operation between the administrations with a view to securing that, if transfer ever took place, it would be effected by the full consent of the natives.[1] There are unquestionably grave questions of reform of administration to be faced, and it remains to be seen whether indirect rule which has succeeded so well in West and East Africa can be secured effectively in the Bechuanaland Protectorate and Basutoland. For the former important rules are included in the proclamations recently enacted by the High Commissioner and upheld by the Secretary of State against the petition of Tshekedi Khama for their disallowance. One Union argument in the discussion is clearly untenable. While the transfer of the territories was contemplated in 1909 as ultimately desirable, no promise of transfer was ever made, nor is one implied in the powers of s. 151 of the Act. Still less, of course, could the power to transfer be executed by any authority other than the King in Council.

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[1] The Union on September 13 expressed its firm adherence to its obligations under the Covenant and its readiness to apply sanctions unanimously agreed to.

The Government of India Act, 1935.—By a great achievement, involving the agreement of the critics of the Bill to arrange discussion so as to have maximum effect, the Bill to implement the proposals of the government for India became law on August 2. Few measures have been more carefully considered, and it is unfortunate that the defects rather than the far-reaching character of the measure should have been grasped in India. It is now clear that federation must follow in time the inauguration of responsible government in the provinces, a conclusion naturally acceptable to those critics who urged that provincial autonomy should be established before any effort at federation was made. In passing through Parliament, the measure unquestionably was improved considerably beyond the results of the investigations of the Joint Select Committee,[2] but in fundamentals nothing was altered, save as regards the composition of the Upper Chamber of the Indian legislature. In the House of Lords it was announced that the system of indirect election would be abandoned and direct election by a special electorate for the Hindu, Muhammadan and Sikh seats provided. The anomaly by which the Upper Chamber is directly elected, the Lower indirectly chosen, the former being exempt from dissolution, must be admitted. The amendment was, however, acceptable to Indian opinion, because it renders impossible of long continuance the indirect election of the Assembly. A minor improvement was the addition of Assam to the list of provinces having second chambers.

The Position of the States.—A good deal of misunderstanding has taken place regarding the position of the rulers under the scheme.[3] The

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[1] Parl. Paper, Cmd. 4948. Cf. Keith, *Letters on Imperial Relations*, 1916–35, pp. 169, 170.

[2] *Journ. Comp. Leg.*, Third Series, vol. xvii, pt. i, pp. 109–13.

[3] Parl. Paper, Cmd. 4843, 4903.

Bill was accordingly altered in a number of particulars to obviate criticism, but in the main the changes are verbal only. The most important was that in clause 6, where for the original provision that a ruler must accept the Act is substituted the principle that he must accede to the federation established by the Act. The result of the change is legally unimportant, but it serves to accentuate the fact that federation is brought about for each state by its own voluntary action, and not imposed from above as in the case of the provinces. But federation once accepted binds the state ; the right of secession is nowhere granted or implied. In s. 45 of the Act, however, an important change is made to meet the legitimate criticism that, as the Bill first stood, on the breakdown of the federation the Governor-General might indefinitely rule without restraint other than that of the Secretary of State. The period is now reduced to three years ; thereafter government must be carried on under the terms of the Act subject to such amendments as Parliament may make. But such amendments must be restricted within the limits defined by schedule 2 of the Act if they are not to affect the accession of the states. This touches a very delicate point, which may give rise to serious trouble later. Each ruler must accept, if he accedes to the federation, the right of Parliament to amend certain provisions of the Act without prejudice to the validity of his accession. What is the position if Parliament goes further ? Can the state claim a declaration from the federal court that it is no longer bound by the federation ? The list of matters which may not be altered without affecting the accession of the states contains some items of great importance. Thus, Parliament cannot deprive the Governor-General of control of defence and external affairs or take away his special responsibilities for tranquillity and financial stability, without, it seems, affecting the adhesion of the states. Moreover, can a state tacitly acquiesce in change, and later at pleasure raise the objection that it is no longer bound ? The net result is to create a federation in which full responsible government cannot be introduced by Parliament without affecting the adhesion of the states.

Legislative Power.—Happily the idea of fixing a limit of time within which an Act must be called in question, if at all, has been dropped in the Act. But the provision in s. 106 regarding legislation to carry out implementing of treaties remains unsatisfactory. The federation may not legislate by virtue of this power save with the assent of the Governors of the provinces ; it is not even made clear that they can act in their discretion, and the assent of each ruler is requisite. External relations have always been in the discretion of the paramount power, and it would have been advisable to authorize the Governor-General in his discretion to sanction legislation for all units of the federation where it was deemed proper to conclude treaties for the whole of India. The legal protection against discrimination to the detriment of British traders in India has been strengthened, but the government refused to accept the proposal that Indian fiscal legislation should have been required to accord to British exports most favoured nation treatment. This rejection is rather curious, for when India received a measure of fiscal autonomy under the Act of 1919 it was part of the accepted principles of the Empire that the United Kingdom should be given any concession made to foreign powers, and in July 1935 Canada reaffirmed her acceptance of the rule by extending to the United Kingdom and the Dominions the special concessions she had made to France and Poland. India, therefore, when being compelled to accept restrictions of dubious validity, might well have been required to adhere to a fundamental principle, in return for like treatment by the United Kingdom. Such a proposal was on quite a different footing from the proposal to compel a British preference or restrict within defined limits the rates of imposts on British exports. It is satisfactory to note that legislative interference with the right to grant special leave to appeal in any case, civil or criminal, is now prohibited,[1] save as specially provided in the Act which aims at the restriction of such appeals from high courts if an appeal lies to the Federal Court.[2] Another satisfactory feature is the exact description of the persons over whom extraterritorial authority may be exercised,[3] so as to cover British subjects domiciled in India. The adoption of the test of domicile is far more satisfactory than the uncertain term "native Indian British subjects"; in the same way the Burmese legislature may regulate extraterritorially the actions of British subjects domiciled in Burma.[4] This is a noteworthy concession to the principle of domicile as distinguishing classes of British subjects, and it should ultimately be regarded as the criterion for the exercise of such jurisdiction over Canadian and Union British subjects, unless it is preferred to restrict authority to Canadian and Union nationals. Clearly no part of the Commonwealth ought to seek to legislate for all British subjects irrespective of their connexion with that part.

Suits against the Crown.—The Governor-General, the Governors of the provinces and the Secretary of State are rendered by s. 306 exempt from proceedings in any court in India, and, even after they have left office, proceedings in respect of any official act or omission can be brought only with the assent of the Crown in Council. The extent of this official exemption is remarkable, for it applies apparently to personal as well as official acts, so that, if a private debt were incurred or a crime committed by any of these persons in India, it could not be made the subject of proceedings there. This is, of course, a wide extension of the limited[5] freedom from responsibility under the former constitution, and it seems to go further than the exemption granted to the Lord-Lieutenant of Ireland, for there is no proof that he was ever exempt from liability in his personal capacity for private debts or crimes. On the other hand, legal proceedings can be brought against the federation or a province in that name and against the Secretary of State in cases where formerly suit was available against the Secretary of State in Council. The maintenance of the right to sue direct in contract is excellent,[1] avoiding as it does the cumbersome procedure by petition of right, apart from the fact that that procedure is applicable only when sums are claimed that are due from the funds of the United Kingdom.

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[1] S. 110 (*b*) (iii).

[2] Ss. 205 (2), 206 (2).

[3] S. 99 (2) (*b*).

[4] S. 351 (2) (*b*).

[5] See Government of India Act, ss. 110, 111. Presumably it is desired only to protect official action, but the terminology is obscure; cf. s. 284 of the Bill.

The Civil Service and Pensions.—The position of civil servants has been further safeguarded, so as to secure that the Governor-General or the Governor shall have a personal responsibility for securing fair treatment in all matters affecting their careers. The Act itself does not determine the rate of Indianization, which is left for later determination by executive action, but the arrangements already in operation are steadily equalizing the numbers of Europeans and Indians in the Indian Civil Service and the Police. The process necessarily involves a decline in the quality of the new recruits for service in India, for the highest offices in the provinces will be ministerial, and the control of policy will pass from the civil service. But during the introductory period of responsible government there will be available the necessary element of experience to guide ministers in their difficult enterprises. The issue of pensions was much debated, and the case for the pensioners was perhaps somewhat underestimated. In asking for a British guarantee, they were made out to be claiming something more than they had ever had. But in fact under the former regime full responsibility for Indian finance rested on British ministers and the British Government was bound so to manage Indian finance as to meet the obligations of India to its services. It is clear that under the new regime the position of pensioners is not so secure, for whatever the duties of the Governor-General may be as regards financial stability, the burden of Indian finance will soon come to rest on the shoulders of ministers, and the belief is universal in India that civil servants from the United Kingdom in respect of pay and pensions impose an excessive burden on India. A delicate situation may therefore arise if ministers find it difficult to meet in full pension obligations without starving other objects of interest. But so far as the Act can secure pensions, it does so. The obligation to pay is statutory, and the Secretary of State has all the legal means necessary to secure that funds shall be provided in England whence payments can be made.[2] But this is far less than a British guarantee. The position regarding loans is analogous, but has raised less interest, doubtless because it is felt that there is no prospect of the British Government consenting at any time to Indian default in interest payments on loans raised in the United Kingdom by the Secretary of State. It must be remembered that investors in these loans have never been warned that they have to look to Indian revenues alone for payment as is the case with all colonial and Dominion loans.[3] India in this regard has always stood on a different footing, though as regards future loans assimilation to the practice in the case of the colonies and the Dominions may be expected.

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[1] Ss. 176–80.

[2] Lord Zetland to Lord Rankeillour, July 26, 1935.

[3] Keith, *Letters on Imperial Relations*, 1916–35, pp. 227, 228.

British Burma.—The grant to Burma of a Constitution independent of that of India was inevitable, and offers to Burma wide prospects of rapid development in constitutional freedom, since the legislature and the ministry are free from the restrictions involved in federal constitutions. The Governor, it must be admitted, will have a very heavy burden of responsibility to bear, since he has to combine the functions of control vested in India in the Governor-General and the Governors,[1] while there exists the possibility of greater unanimity in the legislature. Close relations with India are inevitable in the economic sphere, but objections on behalf of British exporters to the preferential treatment in Burma of their Indian competitors has been in part met by the reduction by agreement to three years of the period during which commercial relations shall remain on virtually their present footing.[2] The immigration issue has also been temporarily adjusted;[3] the growing nationalism of the Burmans is already asserting itself and diminishing the opportunities for Indian workers in Burma.

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[1] Government of India Act, 1935, ss. 326 (1), 354 (1).

[2] S. 453 and Order in Council to be issued thereunder; Parl. Paper, Cmd. 4985, pp. 4–10.

[3] S. 456; draft Order in Council, Cmd. 4985, pp. 11, 12.

NOTES.

The Late Mr. Justice O. W. Holmes.—That sons of distinguished lawyers and ecclesiastics should in turn reach distinction in their father's profession is neither unusual nor difficult to understand. Tradition and opportunity play a considerable part in opening up careers in each of these professions. It is, however, rarer to find hereditary eminence of the kind exemplified by the family of the late Mr. Justice Oliver Wendell Holmes. The fame of his father as a writer and a poet has been no doubt somewhat dimmed as years have passed with their consequent changes of taste and literary manner, but in his day he attained a merited distinction of no mean order. It falls perhaps to other legal journals with less specialized scope than this to dwell upon the son's contributions to legal history, philosophy and practice. Yet the death of so suggestive an historian and so courageous a judge must not be allowed to pass without mention. He lived to a ripe age and his work was accomplished ; his career was long and successful and he enjoyed ample recognition of his work. Students of the Common Law and all who respect and seek to uphold sound judicial traditions will hold his memory in reverence.

R. *v.* **Woolmington.**—" Once it is shewn to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy the jury that what happened was something less." Thus was the law stated to the jury by Mr. Justice Swift in the prosecution of Reginald Woolmington for murder. And in the like sense the law appears to be stated in the Criminal Code which, at the instance of the Colonial Office, has already been introduced into Kenya, Tanganyika, Uganda and Cyprus and is likely very shortly to be made law in Palestine.

> Any person who causes the death of another is presumed to have murdered him, unless the circumstances are such as to raise a contrary presumption. The burden of proving circumstances of excuse, justification or extenuation is upon the person who is shown to have caused the death of another.

Apart from legal objections misunderstanding may, we suggest, result from the insertion of such a provision in a Criminal Code intended for application in territories in which European law may be said to be on its trial, and in which exact understanding of the law is likely to be rare.

The decision of the House of Lords in *R.* v. *Woolmington* [1] will, it is to be hoped, lead the respective authorities to alter the terms of the section so as to bring it into accord with the law there pronounced. "When dealing with a murder case," said their Lordships, "the Crown must first prove (*a*) death as a result of a voluntary act of the accused, and (*b*) malice of the accused. It might prove malice either expressly or by implication. . . . When evidence of death and malice have been given . . . the accused was entitled to show by evidence, or by examination of the circumstances adduced by the Crown, that the act on his part which caused death was either unintentional or provoked."

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[1] 25 Cr. App. R. 72.

Rights of a Third Party under a Contract in French Law.—It is a well-established principle of English law that "a man cannot acquire rights under a contract to which he is not a party" (Anson). English lawyers have remained faithful to this principle with a steadiness which is surprising from the point of view of comparative jurisprudence. For it is a well-known fact that the opposite principle has long ruled in most Continental countries and that nowhere have difficulties of any kind been experienced. According to modern historical research contracts *in favorem tertii* are to be found in Germanic law as early as the Franconian period.[1] Sir William Anson states that the tendency of modern English law is to abolish even the few exceptions to the general principle that "consideration must move from the promisee." If this is true, though Dr. Rheinstein in his recent book on the structure of obligation in Anglo-American law denies it, then English law is about to place itself in opposition in an important particular not only to American law but to the trend of the whole Continental law. There can be no doubt that in Continental law the cases in which a third party can acquire rights under a contract entered into by other parties are rapidly increasing in number. The history of the contract *in favorem tertii* itself is sufficient evidence for that. In the seventeenth and eighteenth centuries, according to the opinion of the majority of legal writers, including that of Grotius, the third party could claim under a contract *in favorem tertii* only after having accepted an offer from the promisee.[2] Later on such acceptance was no longer required: it was sufficient that the creation of a direct claim on the part of the third party was either intended by the promisor and the promisee or corresponded to the habits and usages in that branch of business.[3] And nowadays there are codes where even this is considered unnecessary and where a direct claim on the part of the third party arises from each contract *in favorem tertii*.[4]

In all these cases, however, a contract *in favorem tertii* is necessary. But, at present, development is taking another direction and the third party is in certain cases recognized as having acquired rights out of a contract to which he not only has not been a party, but none of the parties to which even intended to act in his favour. There is an undoubted tendency to increase the number of these cases and to strengthen the position of the *tertius* both in French and in German law. Dr. Wahl in his excellent book on *Vertragsansprüche Dritter im französischen Recht*[1] sets out a detailed statement of all cases where such an "*action directe*" on behalf of the third party is allowed. In most cases this direct action has a statutory basis. The French Civil Code allows the "*mandant*" to sue the substitute of his "*mandataire*"[2]; the Code of Procedure gives a direct claim under certain conditions to the *avoué* of the victorious suitor against the other party; a special statute allows a direct claim on behalf of surgeons, pharmacists and nursing homes against an employer for payment of fees in connexion with an accident in which employees have been injured.

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[1] Brunner, *Zeitschrift für das ges. Handelsrecht*, vol. xxii, p. 96 s.

[2] Cf. Prussian *Allgemeines Landrecht*, I, 5, ss. 75 and 76; French Civil Code, Art. 1121; Saxon Civil Code, 1863, s. 83.

[3] German Civil Code, s. 325; Swiss Law of Obligations, Art. 112; Austrian Civil Code, s. 881.

[4] *E.g.* Brazilian Civil Code, Art. 1098.

At least one very important case has, however, developed outside the limits of codified law. Let us suppose that A has sold certain machines to B which B has in turn resold to C, and that the machines were defective even at the time of the original sale. Can C claim damages direct from A? The question may be of great importance if, for example, B has been adjudicated bankrupt in the interval. The Cour de Cassation has answered it in the affirmative and this decision has met with the approval of many eminent legal writers. There are other cases where the legal basis of the *action directe* is more doubtful. If, for example, B is the tenant of a flat which he has sub-let to C, the courts will, in certain circumstances, allow the head lessor to sue C for payment of the rent payable to B. They justify this view by quoting Art. 1753 (F.C.C.). But whether or not this article covers this case is not easy to discover. It may refer only to the security possessed by the head lessor over the property of the sub-lessee.

It cannot be doubted that decisions like these touch basic elements of contemporary private law. Attempts have been made to reconcile them with the orthodox system of contract as being a declaration of the intention of the parties creating legal results corresponding to this intention. But most of these attempts do not seem very satisfactory. Even if they may solve certain of the cases in question, there remains always the disquieting problem whether or not a formula can be found which covers all of them. Dr. Wahl deals very thoroughly with these attempts and holds that they have failed. He even goes so far as to assert that a classification of the cases in question is impossible; there are some cases whose very nature is so divergent that they defy all attempts at classification. His opinion is that they indicate the beginning of a change in the basic elements of contemporary private law, so that no reconciliation of the new results with the old system can be attained; and he promises in a future work to deal with these general aspects of his problem, for which the present work is intended to furnish the material.

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[1] Berlin: Walter de Gruyther & Co. Pp. ix + 227. RM. 9.

[2] Art. 1994.

Until that work has appeared it is probably fairer to reserve judgment as to this most important conclusion. That the concept of obligation is undergoing a change is agreed by many authors in different countries. The present reviewer himself in 1929 read a paper before the Law Faculty of Frankfort on Main, which has not been published, on the *Bedeutungswandel des Schuldverhältnisses in der modernen Rechtsentwicklung.* Of the greatest importance in this connexion is the essay by Professor Lévy-Ullmann in Vol. I of the *Acta Academiæ Universalis* in which this eminent French lawyer tries to prove the existence of a similar development in English law.[1] There is therefore good reason for Dr. Wahl to proceed with his studies, which every reader of the present book, whether or not he agrees with all the conclusions, will view with hopeful expectation.

One warning, however, may not perhaps be quite out of place. Dr. Wahl says in the preface to his book that the questions he deals with put our whole social constitution into the dock and that the great revolution in Germany confirmed him in his view as to the defective character of the present law of obligations. It is a praiseworthy undertaking to seek to reach general conclusions from observation of special facts. But the research student must be careful to confine himself to such conclusions as can be proved by arguments. To exercise restraint may sometimes be a hard task. To attain scientific truth, however, we must learn to distrust fashions—even fashions in scientific disguise.

E. J. Cohn.

The Orthodox Patriarchate of Jerusalem.—The news that an election has been made to the vacant patriarchal throne of the Orthodox Church in Jerusalem reminds us of the very curious and interesting legal situation occupied by that ancient and authentic surviving institution of the early church.

The finances of the Patriarchate have been for many years past administered by a Financial Commission created by Ordinance of the Government of Palestine and under the chairmanship at present of an ex-government British official. This state of things was rendered necessary by the hopeless economic condition of the Patriarchate as a consequence of the War and of the Russian revolution.

Internal dissensions in the synod and in the community led some years ago to the appointment of two commissions successively, each under the presidency of Sir Anton Bertram, of which the second had special reference to the hostile attitude adopted by a section of the Arabic-speaking laity towards the Greek-speaking hierarchy. This ill-feeling came to a head upon the death of the late Patriarch Damianos, when the Executive Committee of the Arab Orthodox Congress applied to the

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[1] See also Professor Corbin's article, " Contracts for Benefit of Third Persons," in 46 *Law Quarterly Review*, pp. 12 ff.—Editor.

Palestine High Court for an order against the newly appointed *Locum Tenens* to stay proceedings purporting to be elections to the patriarchal throne.

A rule *nisi* for such an order was granted on January 15, 1932. Upon the application to make the rule absolute, many points were advanced in argument. Those of greatest interest concerned the status of the *Locum Tenens* and the proper instrument for the exercise of civil control over the election.

As to the first of these, the Court had no difficulty in holding that the *Locum Tenens* of the Patriarchate was a public officer and therefore a person to whom the Court had jurisdiction to direct orders in regard to the performance of their public duties.[1]

Having asserted its jurisdiction, the Court expressed its surprise that the *Locum Tenens* was unrepresented and had apparently informed the District Commissioner that he claimed to be exempt from the Court's authority.

Notwithstanding the contumacy of the respondent, the Court proceeded to consider the merits of the case, and in particular whether the proceedings taken had accorded with those prescribed by the (Ottoman) Imperial regulations of 1875 which formed the Fundamental Law of the " Roman "[2] Patriarchate of Jerusalem.

The principal difficulty arose in the application of the Regulations to the new political situation created by the British occupation and the mandate. No doubt His Majesty the King must take the place of the Sultan as the civil authority controlling the election of an Orthodox Patriarch. But was such control to be exercised through the High Commissioner of Palestine, or was the Secretary of State the proper instrument for its exercise, the function of the High Commissioner being merely subordinate ? To decide this question it was necessary to determine what officials under the present regime were deemed to represent those mentioned in the Regulations—a problem which has more than once proved troublesome in the application of Ottoman Law to present-day Palestine.

The Ottoman Regulations require the names of eligible candidates to be communicated to the Mutassarrif for submission to the Sublime Porte, so that the names of those disapproved by the Government might be excised from the list. Such a list had been duly submitted to His Excellency, who had announced that none of the names would be excised. It was, however, now contended by the petitioners that His Excellency occupied the position of a Mutassarrif only, and that the decision did not rest with him. This contention, though not in accordance with the views suggested by the Bertram Commission, was nevertheless accepted by the Court. The status of the British High Commissioner is no doubt much superior in official and social dignity to that of a Turkish Mutassarrif, but this could not influence the Court, which in its interpretation of the regulations was of opinion that His Excellency had "in fact albeit obviously inadvertently usurped functions which are expressly vested by law in the authority at the seat of the Imperial Government which can only be represented by the Secretary of State."

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[1] Courts Ordinance, 1924, s. 6 (*b*).

[2] " Roman " in the Ottoman sense, since for the Ottomans the Eastern Empire was the Roman Empire.

The order was therefore made absolute "with costs to include £P5 advocate's fees."

Nearly three and a half years later, namely in May of the current year, the Palestine Government has promulgated an Ordinance[1] "to remove doubts as to the interpretation of the provisions of the Fundamental Law." The thesis of the High Court is adopted and it is declared (s. 2) that in the interpretation of the Fundamental Law any reference to the Mutassarrif shall be construed as a reference to the High Commissioner. In several respects, however, the Ordinance amends the Regulations in a sense recommended by the Bertram Commission.

The election of Mgr. Timotheos, Archbishop of the Jordan, to the Patriarchal Throne has followed hard upon the promulgation of the amended Regulations.[2]

Probation in the Courts.—The publication by the National Association of Probation Officers of their *Handbook of Probation and Social Work of the Courts* is a fitting memorial to the labours of the late Sir William Clarke Hall, who devoted so many years of his life to the development of progressive methods in the juvenile courts and to the sympathetic treatment of neglected children and of offenders, both young and old. For it was at Sir William's suggestion that the Association invited a number of experienced persons to contribute material on different parts of the subject of probation, with a view of presenting a composite picture of the whole question. Unfortunately the death of the distinguished magistrate prevented the realization of the plan during his lifetime, but, as Lord Feversham points out in the preface, Mr. H. E. Norman, the Secretary of the Association, continued to secure the collaboration of a number of experts, and now, under the editorship of Mrs. Le Mesurier, whose work for boy prisoners is so well known, the book has been completed and published through the financial help accorded by the Clarke Hall Fellowship.

In giving this admirable record of the history and present position of probation to the public, these two organizations have performed a very useful service. Although the book is intended more especially for magistrates and probation officers and other persons associated with the work of the courts, it should be studied carefully by members of local authorities, by teachers and social workers, whose activities may bring them into contact with problems in the home and in school. It is particularly valuable that the monograph clears up a number of misconceptions about probation—misconceptions regarding the meaning and use of probation which have led often to unwarranted criticisms of the system. As the *Handbook* reminds us, there is nothing in the law relating to probation in England and Wales which gives support to the view that it is intended chiefly for young offenders or for first offenders, while of the three methods of treatment possible under the Probation of Offenders Act, 1907—dismissal of the case after the charge has been proved, release of the offender on a recognizance without supervision, the release of the offender on a recognizance *with* supervision—it is only in the last case that a Probation Order is made and the offender is required to remain under the supervision of the person named in the Order. It will be seen, therefore, that probation by probation officers covers only a limited field in the re-education of the wrong-doer.

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[1] Orthodox Patriarch Election Ordinance, No. 21 of 1935; see also Orthodox Patriarch (Further Provisions) Ordinance, No. 29 of 1935.

[2] The election of Mgr. Timotheos has not apparently satisfied the Arab laity. It is now announced (August 1935) that a petition contesting the validity of the election is to be presented to the High Court. This must be done within thirty days from the date of the election. (Orthodox Patriarch [Further Provisions] Ordinance, 1935.)

The recent increase in the number of juvenile delinquents which has been revealed by the figures contained in the last two volumes of Criminal Statistics gives some reason for believing that the present methods of dealing with young persons are not altogether satisfactory. In 1933, out of 13,634 persons found guilty in the Juvenile Courts, 3,070 cases were dismissed after the charge had been proved, 1,294 were bound over without supervision, 7,353 were bound over with supervision and only 1,289 were sent to approved schools. Of adult offenders, though 40 per cent. were dealt with under Probation of Offenders Act, only 18 per cent. were placed under the care of a Probationer Officer. Indeed, the *Handbook* provides material for anxiety regarding the whole position in certain areas up and down the country. There seems reason to apprehend that in some instances Probation Committees do not discharge their duties in the spirit of the Probation Rules, that inadequate staffing arrangements exist, that there are too many half-time officers, who carry case loads which are appropriate only for full-time workers and that consequently the Courts cannot ensure that, by careful preliminary investigation, a proper selection is made of cases suitable for probation. Nor is the subsequent following up always carried out by means of the necessary visitation, owing to the officers being too heavily over-weighted by work of one kind or another. Very rightly the *Handbook* points out, that " The more attention is bestowed upon the whole question of investigation and the vast field it opens, the more clearly does the fact emerge that without thorough investigation, probation must be a house built upon the sand." Furthermore, both enquiry and the subsequent treatment of probationers require skilled training and no one who studies the *Handbook* can fail to be impressed by the need for more highly qualified officers. Nor is it without bearing on the whole matter that many probation officers are agents of voluntary societies, not all of which have provided training schemes. A closer linking up of probation areas seems indicated, so as to render possible an increase in the present figure of 285 full-time officers out of a total muster of 831. More women officers, too, should be appointed.

Although the probation system still has to face many difficulties, it is recognized that much excellent work is being accomplished and that the system has been responsible for reducing the number of receptions into prison from 555 per 100,000 of the population in 1913–14 to 128 per 100,000 in 1933. Yet it is impossible not to feel that a more complete organization would keep a larger number of young persons out of gaol. It cannot be regarded as satisfactory, that over 2,000 boys and girls are sent to prison each year (exclusive of those lodged on remand), of whom from 34 to 40 per cent. have had no previous conviction. Indeed, the impression gained from a study of this informative volume is that probation has not yet emerged entirely from the transitional stage and that some courts are still " curiously indifferent " to the importance of making full use both of home investigations and medical examinations. It is disquieting to learn that even in London some of the courts fail to ask for the careful reports furnished on lads remanded to the Boys' Prison at Wormwood Scrubs, reports which are based on expert observation and on home visits paid by experienced social workers. There is little doubt that the public attitude towards probation will grow even more sympathetic than it is when the value of the work is upheld by judicious action in the courts. There is, it is generally admitted, a great opportunity for developing certain social services in relation to probation, both in regard to the after-care of young delinquents and of older offenders, in dealing with the question of domestic relations and in making greater use of supervision in securing the payment of fines. It is to be hoped that the Departmental Committee which is now sitting will explore all these matters and will consider, too, the need of consolidating the Probation Acts. It is of great importance that the whole system should be placed on a footing which will attract the best men and women to the service and will render possible also an interchange of probation workers between the courts, the social services of other government departments and those of local authorities.

N. ADLER.

Delegated Legislation in Northern Ireland.—Good Benthamites demand that law should be ascertainable. It should be possible to consult, even if not always to comprehend, an Act of Parliament. A like publicity is required for departmental enactments. The labours of the Statute Law Committee for Northern Ireland, in respect both of direct and of delegated legislation, are exemplary. It publishes with reasonable punctuality the statutes of the Belfast Parliament and the Statutory Rules and Orders of the Belfast departments. It has produced an official

Chronological Table and Index of the Statutes in Force in Northern Ireland, and now it has produced an Index to the Statutory Rules and Orders in Force in Northern Ireland as at August 31, 1930. With this admirable series of texts and indexes, and with Sir Arthur Quekett's authoritative volumes on the Constitution of Northern Ireland, the whole field is now mapped out. Notwithstanding its different sources before and after the Act of Union in 1800 and before and after an " appointed day " in 1921, the law is now accessible.

The new Index to Northern Ireland Statutory Rules and Orders is modelled on the similar official work published triennially for the United Kingdom, to which it gives copious cross-references in respect of matters not within the competence of the Belfast administration. Under standardized subject-headings there are entries of the " power " in any enabling Act and of the " exercise " of that power in the form of rules, regulations or orders. If this first edition speaks to a date in 1930, its framework, which must have required immense research, can soon be filled in with later accretions already accessible in annual texts. The beginning, as the Greeks said, is half the whole. This is a good beginning.

In its general scheme of law-making Belfast is happily linked to Westminster ; but, for matters within her legislative power, Northern Ireland has her own Rules Publication Act, improving upon the tentative Act of 1893. The requirement of prior notice, under section 1 of the 1893 Act, is abolished. Consequently the new Index has little trouble with " Provisional Rules," made in cases of certified urgency under s. 2, which escape the requirement of s. 1 and are technically outside the scheme of official publication under s. 3, though intended to be brought within s. 3 (by action under s. 1) as soon as the emergency is past. Search in the Index reveals a few necessary references to such Provisional Rules of the old regime, *priscæ vestigia fraudis*, still unconverted into Statutory Rules. One set of such rules is twenty-five years old.

C. T. C.

Current Events.—The study of the laws of any country in order to be adequate requires to be accompanied by a knowledge of current events. The daily press does not always provide the necessary material, since political or other influences are liable to accentuate some feature which does not retain permanence. During the passing of the Local Government Act, 1929, for example, the provisions which received general attention were those relating to derating, while a considerable reform in the health service of the country was included with hardly any notice. Moreover the laws of one year are due to events or inquiries which took place in a previous year, sometimes several years earlier. There is particular value, therefore, in the *Annual Register* [1] which within a short interval after the completion of the calendar year provides a balanced survey with an historical appreciation of the events likely to be of enduring importance.

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[1] London : Longmans, Green & Co. 30*s*. annually.

Great Britain, the Empire and foreign countries form the main sections of a work of reference which is unique in its scope and maintained at a high standard of reliability. Separate sections and in particular that which deals with the law of the year add to the value of this work, which is of particular service to the draftsman of laws, the legislator or anyone concerned with the laws of his own or other countries. Dr. Epstein and his colleagues each year provide a work of enduring value in which not the least useful feature is the selection of public documents much discussed but not often available *in extenso*. A work which has been continued on this scale for 176 years deserves the practical support to be derived from an extended circulation at a time when there is an increasing number who take an intelligent interest in current events throughout the world.

American Journal of International Law.—The first place in the July number is assigned to an article by Professor Quincy Wright, who analyses acutely the various attempts which have been made to define aggression. His own contribution to the problem is to suggest that the essence of aggression, in the case of States bound by obligations not to resort to force, lies in the refusal to accept an armistice. But this solution, like those which Professor Wright has criticized, raises a host of difficulties.

Mr. C. J. Kulsrud contributes a learned historical article drawing attention to various examples of "armed neutralities" earlier than the classic case of 1780. An article by Dr. von der Heydte analyses the doctrine of title by discovery from the fourteenth century to modern times. Two recent arbitration cases, as well as the Chaco War, serve to remind us that the interest of this problem is not merely antiquarian. Another leading article, contributed by Professor Borchard, discusses a problem which is primarily of American interest, the difficulties created by a statute of 1907 in determining the nationality of American women who married aliens before the enactment of the statute.

Several of the shorter contributions deal with matters of general interest and importance The supplement is devoted to the draft convention prepared by the Harvard Law School on the subject of "Jurisdiction with Respect to Crime."

H. A. S.

NOTICES OF BOOKS.

THE CONSTITUTION OF THE EMPIRE.

THE constitution of the Union of South Africa has shown most interesting developments in the twenty-five years of its existence, and it is fortunate that we have so timely been given an adequate treatise[1] on its varied aspect by the combined efforts of Professor W. P. M. Kennedy, of Toronto, and Mr. H. J. Schlosberg, late of the Transvaal Bar and author of an interesting sketch, *The King's Republics*. The treatment of the subject is historical and objective. There is a satisfactory balance between the examination of principle and the presentation of detail. On the vexed question of the divisibility of the Crown and the questions of secession and neutrality the authors adopt (p. 484) a legitimate conservatism ; the issues are largely political and their solution depends on factors of the most complex character. Special value attaches to the care with which the provincial system is examined in its theory and its operation. The authors indicate both its defects and the possible line of remedying them (pp. 336–49), but their views have to face the difficulties inherent in altering a situation which was the product of a compromise between conflicting ideals, and which has proved to possess rather unexpected vitality. The administration of justice receives full consideration, the nature of the administrative tribunals of the Union is clearly explained, and it is shown to what degrees there has been departure, especially in connexion with native administration, from the rule of law as understood in England. The account of the government of the natives is full and clear ; the authors wrote before the latest development of the governmental plans as to the extinction of the Cape franchise and the substitution of a limited representation of the natives of the Union in the Senate. The accuracy of the treatise adds greatly to its value and to our indebtedness to its authors.

The growing cordiality of relations between Germany and the Union will doubtless, as hoped by the author, Otto W. A. Hoops, ensure in the Reich interest in his study of the status of the Union.[2] The short essay is based on sound information ; it adopts the extreme view of the international personality of the Dominions and assigns to the Union the power of unilateral declaration of secession and of the declaration of neutrality, but admits that these rights have not yet received general international recognition (pp. 64–7). He quite fairly stresses the fact that under the Union nationality system Union nationals may not be British subjects, but it remains true that in the vast majority of cases Union nationals are subsumed under the wider class of British subjects, and that legislation will be necessary if this is to be altered. His views may be compared with those expressed by Dr. F. Apelt in his elaborate dissertation on *Das Britische Reich als völkerrechtsverbundene Staatengemeinschaft*,[1] which is a storehouse of relevant facts and theories, affording interesting evidence of the interest taken by foreign jurists in the relations of the British Commonwealth. Perhaps these commentators fail to realize that in the Commonwealth itself these issues interest virtually the Union and the Irish Free State alone. For the latter, much light is thrown on the making of the treaty of 1921 by the elaborate account of Mr. Frank Pakenham in his *Peace by Ordeal*.[2] No earlier account of that instrument can compare in insight with that now given. Mr. Pakenham concludes with an appeal (pp. 351–63) for the settlement on an equitable basis of the present disputes ; he is doubtless right in holding that they are now essentially political, not economic.

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[1] *The Law and Custom of the South African Constitution.* (London : Humphrey Milford, Oxford University Press, 1935.) Pp. xxxix + 640. 36*s*.

[2] *Der Status der Südafrikanischen Union.* (Hamburg : Hans Christian, 1935.) Pp. 95.

A. Berriedale Keith.

CONSULTATION AND CO-OPERATION IN THE BRITISH COMMONWEALTH.

This compilation[3] differs refreshingly from most work in its sphere in taking a horizontal view of Commonwealth institutions as they exist at the present moment. The student who adopts the usual historical method of treatment is committed to the obvious formula for the history of the Commonwealth, namely, the gradual emancipation of the Dominions from the control of the United Kingdom. Upon this formula, the past appears simply as the working out of this single negative process, and a cross-section taken at any one point of time seems as unstable and as devoid of significance as the shape of a pat of butter melting in the pan. The stage has now been reached where such treatment, from being inadequate, has become empty. Except in the single case of Anglo-Irish relations, the important problems of the Commonwealth no longer concern the dissolution of ancient constitutional ties, but the position of the British group of nations in world affairs, and the adequacy of their common and several machinery to that position.

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[1] *Leipziger rechtswissenschaft Studien*, Heft 90. (Leipzig : Theodor Weicher, 1934.) Pp. vii + 208. R.M.7.50.

[2] (London : Jonathan Cape, 1935.) Pp. xii + 400. 15*s*.

[3] *Consultation and Co-operation in the British Commonwealth.* The handbook prepared by Mr. G. E. H. Palmer for the First Unofficial Conference on British Commonwealth Relations held in Toronto in September 1933, under the joint auspices of Chatham House and the Canadian and Australian Institutes of International Affairs. (London : Humphrey Milford, Oxford University Press.) Pp. lix + 264. 12*s*. 6*d*.

The two Institutes, in the choice of the central subject of their conference, which was that of this book, and Mr. Palmer, in its compilation, have found the right emphasis. In including general discussions of the Governor-General and the Judicial Committee of the Privy Council, the book exceeds its title and its function. The Judicial Committee is not an organ of Commonwealth consultation or co-operation, and the Governor-General only in New Zealand and (normally) Newfoundland. The information concerning the appointment of Governors-General is, however, valuable in itself. Of the main portion of the book some chapters, such as that on the Imperial Conference, summarize facts already accessible. Others, such as those on Dominion External Affairs Departments and Diplomatic Services, and Mr. R. C. M. Arnold's contribution on practice and procedure in connexion with international conferences and treaties, present information not hitherto available in any convenient form. The fact that this information has been checked, and in some cases actually contributed, by collaborators in the major Dominions adds considerably to the accuracy and to the authority of the text, while detracting somewhat from the symmetry of the tabulation. The Canadian material is particularly detailed and excellent.

This compilation will leave on the reader, as it did on the Toronto Conference, an impression of the inadequacy of existing Commonwealth machinery for securing even that degree of mutual information and joint action which is unanimously desired by effective members of the Commonwealth. It further shows that, on the whole, the only institutions which are now actively developing are the separate organs of Dominion external policy: Dominion legations are being established in capital after capital, and the office of High Commissioner in London is steadily growing in importance. Collective institutions are stationary or retrogressing. There is, however, a notable exception to this rule in the Australian system of direct liaison with the Foreign Office in lieu of separate diplomatic representation abroad. While this arrangement would leave the Dominion high and dry in the event of a serious difference of opinion from the United Kingdom over a question of foreign policy, it assures to the Dominion in all situations short of that a better service of information and a more effective, if less direct, influence in world affairs than are enjoyed by Dominions with separate diplomatic services.

Professor A. B. Keith's concise and comprehensive historical introduction is too wide in its scope and too narrow in its treatment to form by itself an adequate background to Mr. Palmer's compilation. Both parts of this book should be read with the account of the Toronto Conference edited by Professor Toynbee and published under the title *British Commonwealth Relations*. The three works together form an admirable account of the state of the Commonwealth in 1933.

There are a couple of misprints, and the index is inadequate. The reviewer has found no errors of statement. The production is excellent.

R. T. E. LATHAM.

THE FIRST CENTURY OF BRITISH JUSTICE IN INDIA.[1]

British law and justice in India have fared badly at the hands of the historians. Ever since the days when Macaulay's formidable powers of invective were devoted to blasting the early reputation of the Supreme Court at Calcutta there have never been wanting scribes of minor merit who have sought inspiration from his example in their efforts to disparage the achievements of their countrymen abroad. The fact that the injustice of Macaulay's diatribes has from time to time been demonstrated by competent critics has not served to check the output of slander. In India it is, of course, common form, but it still continues in what one would expect to be more responsible quarters.

In a book recently published in England we are invited on the high authority of Mephistopheles (Goethe) to accept the proposition that law is nothing but a poison and, so, to agree with the conclusion of the authors that the British courts in India have served only to inoculate the people with a noxious disease which has "undermined the independence of the countryman and placed the uneducated poor at the mercy of the wealthy and literate." Our system of justice is compared unfavourably with that of our predecessors, the Moghuls, whose law, it seems, did not lend itself to subtlety and chicanery and was administered by not over-zealous officials who were scrupulously careful not to encourage litigation.

This covert eulogy of the Moghul government reads strangely alongside of the account given of it by Warren Hastings in his Report on the State of Bengal in 1772, a few years after the responsibility for the civil administration of that Province had been cast upon the East India Company by the cession of the Diwāni:

> The regular course [of justice] was everywhere suspended; but every man exercised it who had the power of compelling others to submit to his decision. . . . The subjects of the Moghul empire derived little protection or security from them [*i.e.* the courts of justice]. In general, though forms of judicature were established and preserved, the despotic principles of the Government rendered them instruments of power rather than justice. They did not protect the people, but were often the means of the most grievous oppression. The judges were generally under the influence of interest and corruption, and the interposition of Government from motives of favour and displeasure was another frequent cause of the perversion of justice.

Such, in Bengal at any rate, if Hastings is a witness of truth, were the results of those "rough and ready" methods of the Moghuls which are now held up to our admiration, and Bengal, it is to be remembered, had long been the most settled of all the Moghul provinces, the least exposed to disturbance both from without and within.

The fact is that the historians who delight in the abuse of British institutions in India either ignore or misappreciate the prodigious difficulties which were encountered in the course of our early efforts to produce order out of the chaos into which the whole country had been plunged by the disintegration of the Moghul power. For fifty years before the battle of Plassey, and for a long period after that event, India was a veritable cockpit in which native powers and foreign adventurers were engaged in a fierce scramble for the fragments of a once mighty empire, a condition which rendered impossible the existence of any organized system of civil government. In Bengal the Company were faced with the herculean task of reducing a vast and densely populated territory to order by setting up regular tribunals for the suppression of crime and the determination of disputes, otherwise than by the barbarous method of private redress. The systems of law under which the inhabitants lived differed from each other and were utterly unlike any system known to Europe at that time. They were recorded in strange languages, unknown to the Company's servants, who were traders and not lawyers, and who, in point of numbers, were quite unequal to the task of exercising judicial control over the millions who filled the conquered territory.

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[1] By Sir Charles Fawcett. (London: Humphrey Milford, Oxford University Press.) Pp. xix + 269. 15*s*. net.

The situation was rendered still more difficult by the attitude of the British Government of the time, which, while eager both to control the operations of the Company and to participate in their profits, shirked the duty of asserting the sovereignty of the Crown and left the Company in the awkward predicament of having, in name at any rate, to exercise their functions as a governing body under powers derived from the Emperor of Delhi.

It is not surprising, therefore, that blunders were made which were only to be repaired by a long period of painful experience. A perfect judicial system could not be evolved overnight, and it was the work of years to produce the system which is in force to-day, a system for which, indeed, no one would claim perfection, but one which serves India well and which does command the confidence of the Indian people.

Our law in India has its defects. It errs, as Sir James Fitzjames Stephen has remarked, on the side of over-minuteness. It has on the other hand the merit of being simple and definite ; and we have now, as he goes on to say, " a network of courts arranged in different grades and connected together by a system of superintendence, revision and appeal which may in some particulars be over-elaborate, but which is the best security against oppression and corruption." What Stephen wrote some fifty years ago is still more true to-day, for during this interval there has been a conspicuous improvement, both in the personnel and the work of the Indian judiciary, which, it should be remembered, is mainly Indian. Thanks to the stringent control of the High Courts, corruption is nowadays practically unknown, and so long as this control is allowed to be maintained there need be no fear that the courts in India generally will be less efficient than they are elsewhere. The fact that they are overwhelmed with work is convincing evidence of the confidence they enjoy among the people, and if our Indian subjects are inordinately fond of litigation it is surely more expedient to provide them with courts of justice rather than leave them to the primitive and violent methods of private vengeance.

It is well, therefore, that the book now under notice has been written to describe the history of the first century of British justice in India. With a wealth of reference to contemporaneous documents which have hitherto been unnoticed it serves to illustrate in a vivid manner the difficulties which beset our first attempts to introduce ordered government into India. It is concerned mainly with the narrative of events in Bombay, where British justice first came to be administered to the native inhabitants by a special court of judicature.

In some respects Bombay was more favourably situated than the other Indian provinces, for it started with the advantage of being already British territory when it was handed over to the East India Company in 1668 under a Charter which authorized them to make laws for "the good government of the Port and Island and the inhabitants thereof" and to erect courts "like unto those established and used in our Realm of England." No question could therefore arise as to the source of authority for the laws or for the courts which were to administer them. At that period Portuguese laws and methods were in force to some extent on the Western mainland, but there were no courts on the Island itself, which appears to have been completely under the control of the Jesuits, whose notions of justice and good government seem to have been on the same level as those of the Moghuls described by Warren Hastings.

The territory, again, was of small extent and, so, easier to govern, for it was not till early in the nineteenth century, after the final overthrow of the Maratha power, that the Presidency began to assume anything like its present dimensions. All the same the establishment of an effective judicial system was hampered by circumstances which were almost too strong for the Company's agents. The island contained a troublesome mixed population including a lawless European element. A mutinous soldiery occasioned much mischief from within, while from outside the attacks of the Siddi pirates were a constant menace to the existence of the settlement.

The Company, availing themselves of the powers conferred by the Charter, drew up and sent out in 1670 a short code of laws, excellent in its way though inadequate on the criminal side, considering the nature of the people to whom it was to be applied. But they seem to have been in no great hurry to provide their local representatives with a court to enforce it. They were pressed to send out a judge, "skilled in the law," to preside over the court they had sanctioned, but demurred to this request out of apprehension that the appointment of a lawyer would only tend to the stirring up of strife and contention ; and they seem to have had peculiar notions as to the salary which should attach to the office of Chief Justice. However, the court of judicature was eventually established in 1672 under the presidency of Wilcox, one of the Company's factors, who had some acquaintance with law and procedure. The Portuguese law was formally abrogated by substitution of the Code of 1670.

Of this Code it may be said that though exiguous in its content, it represented an honest attempt to provide even-handed justice for all classes of the community. Existing privileges and rights of property were preserved to all and religious beliefs and usages were duly protected. The laws were simple and suitable generally for the classes of cases which were likely to come up for decision. The most important provision was that all cases, civil or criminal, were to be tried by jury—by a mixed jury where the parties belonged to different races. The court fees prescribed were moderate in amount, and, shortly after, there was established a Poor Man's Court in which claims could be brought *in forma pauperis*. And soon after there was introduced, under the direction of the Governor, Aungier, the Pancháyat system by which caste representatives were empowered to deal judicially with such disputes as the native population agreed to submit to their decision.

This first Court of Judicature had a fair start and appears to have functioned for a time with reasonable success, until its work began to be interrupted by unfortunate conflicts with the executive government, a feature of our early administration which was to come into prominence a century later, when the Supreme Court was erected in Calcutta. These disputes were deplorable but to some extent unavoidable. They were due in part to failure to delimit clearly the respective jurisdictions and functions of the executive and the judiciary. The Governor and his Council exercised judicial powers as a court of appeal, and probably found that too much law embarrassed them in the use of their executive powers when trying to cope with the dangers to which the existence of the settlement was exposed. Deaths and dismissals eventually led to the suspension of the court as first instituted and for a long period justice was dispensed by a court of Justices, made up of the Company's servants and representatives of the town populace, very much on the lines of the Mayor's Courts which came to be established in the three Presidency towns under the Charter of 1726. The introduction of these latter courts represented a change of policy on the part of the British Government in its attitude towards the Company's affairs. While it may be, as suggested in this book, that the change was not made out of any dissatisfaction with the conduct of the existing courts in India, it was probably dictated by the growing inclination of Parliament to assert a closer control over the business of the Company, which found fuller expression later in the enactment of the Regulating Act of 1773, and the establishment of the Supreme Court at Calcutta in 1774. It does not appear that these new courts, which were King's and not Company's courts, were any great improvement on those which they superseded ; but one important innovation was that the Charter provided for an appeal to the King in Council from the appellate jurisdiction of the Governors and their Councils which it was deemed expedient still to preserve. One result of this became apparent in the friction which arose between the Mayor's Courts and the executive body which took offence at what they called the "independency" of these new tribunals, an echo of the sentiments expressed in 1687 when the municipality of Madras was set up under a Charter of James II. On that occasion the Company persuaded the Cabinet to allow the Charter to issue under its own seal instead of under the great seal, by representing that the appointment of officials under immediate commission from his Majesty was inexpedient "because the wind of extraordinary honour in their heads would probably render them so haughty and overbearing that the Company would be forced to remove them." This exhibition of judicial independence was to be welcomed as an indication of progress in the right direction. It seems, too, that the Company began to scrutinize more closely the proceedings of the Indian courts, for we find that their records were sent home periodically and were examined by the Company's law officers—a practice which served as a useful check upon the vagaries of the Benches, especially in cases which could not form the subject of appeal to His Majesty. On the other hand, the procedure of the Mayor's Courts, which was that of Westminster Hall, was unsuited to Indian conditions and occasioned much delay in cases in which native litigants were concerned. The fact was recognized when the new Charter for these courts issued in 1753; it provided expressly that all suits and actions between the natives only were to be excepted from the jurisdiction and to be determined by the parties themselves, unless they agreed to have them decided by the courts. This was hardly a solution of the problem, for the natives, while they might well prefer to have a court which would judge them by their own laws, had no means of finding one. It is hardly surprising therefore that they continued to flock to the British courts as they did before. Some time was yet to elapse before it became apparent that the true policy in this respect was that which later commended itself to the good sense of Warren Hastings, the administration to the people of India of their own laws in regular courts, constituted by the authority of the Government, and presided over in general by judges of their own race.

The Mayor's Courts, however, marked a stage towards the introduction of the professional element into the judiciary, which was brought about first in Calcutta when the Supreme Court was founded in 1774, and later, in 1798, when the Recorder's Courts were set up in Madras and Bombay.

Through all the vicissitudes described in this interesting narrative the courts, imperfect as they were, did manage, as Sir Charles Fawcett claims, to make "an effective contribution to the development in India of the high standard of justice that is one of the pillars of the British Empire."

The value of that contribution has lately been assessed in the following passage from the Report of the Joint Committee on Indian Constitutional Reform, vol. i (pt. i), p. 3, para. 6:

> The record of British rule in India is well known. Though we claim for it neither infallibility nor perfection, since, like all systems of government, it has, at times, fallen into error, it is well to remember the greatness of its achievement. . . . It has established the rule of law, and by the creation of a just administration and an upright judiciary, it has secured to every subject of His Majesty in British India the right to go in peace about his daily work and to retain for his own use the fruit of his labours.

Here, we venture to think, is to be found a more just appraisement of the work of our courts in India than that offered by those who hold that our system of law and justice has served only to reduce the people of India to a state of misery and degradation.

It is, perhaps, too much to expect at the present day that the slanders on our Indian administration which have had such a long start will be successfully overtaken ; but this candid chronicle of the early judicial history of Bombay has not, we trust, been written in vain, and can be recommended to those who are interested in Indian affairs as an antidote to the venomous criticism which does not shrink from citing the Devil to its own purpose.

B. L.

BOMBAY IN THE DAYS OF GEORGE IV.

THE sub-title most correctly indicates the nature of the contents of this book.[1] Sir Edward West enjoys some fame as a Ricardian economist, but it is with his career as the first Chief Justice of Bombay from 1823 till his death in 1828 that Mr. Drewitt is concerned. The period was transitional. British rule in India was definitely emerging from the stage of trade exploitation and spoils for the victors and showing signs of adopting the principle soon to be stated by Lord William Bentinck that " the end of government is the welfare of the governed." The traditions of the older system were still, however, strong even in high circles.

Sir Edward was a man of strict integrity and a strong sense of justice. His efforts to reform the abuses in the administration of justice were not sympathetically supported by the Governors and the civil staff, and relations became strained, so much so, indeed, that the Governor was induced to challenge the Chief Justice, who, very properly, refused to come out.

The blame for all the conflicts is thrown by Mr. Drewitt exclusively upon Mountstuart Elphinstone, the Governor, and his successor Sir John Malcolm. Wilson, the continuator of Mill's *History*, takes a different view. Sir Edward West, he says (vol. iii, p. 280), " clearly evinced a disposition to set aside the local government and usurp an independent and paramount authority . . . [he and his colleagues] engaged with more than decorous vehemence in contests with the Government regarding the extent of their jurisdiction." Wilson was, no doubt, favourably inclined towards the Company and, moreover, if Mr. Drewitt is right as to dates, no responsibility can attach to West in respect of the most serious case of conflict, that concerning the writ of *habeas corpus* issued in the matter of Moro Raghunath. West, we are assured, died before the writ was issued, and had he lived it would probably not have been issued.

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[1] *Bombay in the Days of George IV : Memoirs of Sir Edward West.* By F. Dawtrey Drewitt. (London : Longmans, Green & Co.) Pp. 332. 10*s*. 6*d*.

It may be that this particular conflict would have been avoided by West, but his general attitude towards the local government was unsympathetic and suspicious, and he inspired his weaker colleague, Sir Charles Chambers, with the same sentiments. West was a reserved and austere man with a high sense of his own dignity and an overwhelming conviction as to the rightness of his actions. An independent judiciary under his rule was very likely to infuriate an Executive struggling with new and complicated responsibilities and heartily disliking the new restraints imposed from above.

It remains to add that the narrative and letters afford us glimpses of Bombay life, sometimes pleasing and sometimes surprising. We go on picnic with the gentle Bishop Heber and dine out to meet Sir Hudson Lowe, "a stupid man, looks sheepish, very silent and anything but pleasing."

The appalling mortality among the Anglo-Indian judges in this decade is thought by the author to have been due to datura poisoning, and Sir Edward West is regarded as one of the victims.

F. M. G.

THE ENGLISH LEGAL TRADITION.[1]

PROFESSOR LÉVY-ULLMANN, a distinguished member of the famous Faculty of Law of the University of Paris, has written a book which, in the future, may well come to be regarded as a landmark in international relations, and which is, in the present, a production of great interest and value both to English and Continental lawyers. Professor Lévy-Ullmann has long been known as a French jurist deeply interested in English legal institutions, as well as a most courteous and hospitable friend of English lawyers who have the good fortune to meet him. The excellent impression which he created on the occasion of his visit to Oxford in the year 1924, as the honoured guest of the Society of Public Teachers of Law, will be within the memory of some, at least, of our readers ; and the important part which he has played in the foundation and development of the International Academy of Comparative Law at The Hague is well known.

Doubtless it is for the benefit, first, of his own countrymen, and, second, for those of his other colleagues working in the countries of the Civilian Tradition, that Professor Lévy-Ullmann's book has been written.

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[1] *The English Legal Tradition : Its Sources and History.* By Henri Lévy-Ullmann, Professor of Comparative Law in the University of Paris, Vice-President of the International Academy of Comparative Law, The Hague. Translated from the French by M. Mitchell and revised and edited by Frederic M. Goadby, D.C.L. With a Foreword by Sir W. S. Holdsworth, Vinerian Professor in English Law, University of Oxford. (London : Macmillan & Co., 1935.) Pp. lvi + 383. 16*s*. net.

Its author has been one of the leaders in the new academic movement which has fostered the study of Comparative Law, a science founded in Western Europe by the brilliant work of Montesquieu, but destined, for centuries, to be retarded by the baneful growth of literary and scientific nationalism. One of the very few beneficial results of the Great War has been the revival, among thinkers concerned with the future of civilization, of a conviction of the urgent importance of rebuilding the shattered structure of International Law, and, with it, of a study, by jurists of different nations, of the legal institutions of their neighbours, with the ultimate object of removing the friction which must, almost inevitably, arise in international intercourse, from an ignorance of differences which profoundly affect the mentality of the different parties to that intercourse. How great are the difficulties of such a task may, perhaps, be most quickly realized by a reflection on the fate of recent well-meant attempts to find a universal language, which is its chief desideratum. The melancholy truth appears to be that a universal language is not possible, and that, if it were possible, it would be unnecessary.

Nevertheless, though Professor Lévy-Ullmann, in writing the book which here we welcome, may have been thinking, primarily, of his fellow-countrymen and his Continental neighbours, English readers will be grateful to the translator and English editor of the text before us, for their labours in preparing an English edition of the author's work. It is natural for Englishmen, justly proud of their achievement in creating the one strikingly successful and widespread modern system of law to be inclined to under-estimate its defects, and to ignore the difficulties which it sometimes introduces into international intercourse. And it is hardly possible for English readers to be reminded of this weakness more gently or courteously than by studying the picture of that system, painted, not by a hostile critic, but by a warm admirer of it, whose knowledge of the system is only equalled by the charm and skill with which he describes it, and the generous attitude which he displays towards the many English writers from whose works he quotes. If, indeed, any criticism of the author's plan is permissible, it might take the form of a regret that, in his thorough and accurate description of the English system, he does not more frequently insert, by way of contrast, the corresponding features of his own. But, doubtless, Professor Lévy-Ullmann's well-justified reply to such criticism would be that it is for an English author to produce a corresponding work on the Civilian Tradition of Western Europe, for the benefit of his fellow-countrymen.

It must not be supposed that the somewhat comprehensive title of Professor Lévy-Ullmann's book is made by him an excuse for that rather vague, dithyrambic kind of work which an English reader, especially an English lawyer, instinctively distrusts. On the contrary, the author combines lucidity of style with thoroughness of treatment in a manner characteristic of the best French authors. He sets out, at an early stage, the six leading features which, to his mind, differentiate the English from the Continental systems of law. With regard to five of these—its "unwritten" form, its historical attitude, its judiciary character, the slightness of its debt to Roman law, its surviving tinge of feudalism—few English critics would demur. But it is, perhaps, a little startling to find that, as a sixth feature, Professor Lévy-Ullmann should suggest that English law "does not correspond to a national unity" (p. xlvi); and we rather hope that, on reconsideration, he may be brought to modify this verdict. It is true, as he points out, that English law is by no means supreme in all the countries which own the sway of King George V (Scotland for example). But is not this just because, for centuries before the Union, England and Scotland were each building up a national system of its own, which, in friendly fashion, they agreed to maintain in 1707? On the other hand, it is legitimate matter for pride in English lawyers that it is English law that has transplanted itself, not by force, but by insistent adoption, to many of the overseas possessions, past and present, of the British Crown.

Professor Lévy-Ullmann next proceeds to a thorough examination of the traditional notion of the Common Law, its alleged foundation on immemorial custom, the decisions of the courts, the records and reports, and the books of authority; ending up with a brief discussion of the foreign elements (Roman Law and the Custom of the Merchants) which have influenced it. He then deals, though more summarily, with our statute law, and does not shrink from discussing such very difficult problems as the judiciary character of Parliament and the doubtful authority of certain alleged sources of our earlier statutes. Finally, in an interesting and suggestive treatment of Equity, one of the most original and anomalous features of the English Corpus Juris, Professor Lévy-Ullmann shows himself equally familiar with the rival theories which have from time to time been put forward as to the sources from which the great Chancellors derived those principles which have had such a profound effect upon the later developments of English law. If a criticism may be ventured upon this last subject, we could wish that Professor Lévy-Ullmann had discussed a suggestion which the present writer ventured to put forward in print a few years ago. Doubtless the early (ecclesiastical) Chancellors borrowed a good deal from the canon law, and, in particular, the Romano-Canon procedure. But were not the later Chancellors, particularly in the eighteenth century, more directly influenced by the attitude of the average respectable citizen, as contrasted with the money-grabber and the get-rich-quick speculator? The decent citizen did not foreclose on a valuable estate because the mortgagor was a day late in repaying his money; he did not refuse to convey a house which he had legally contracted to sell because he preferred to pay damages; he did not seek to enforce a contract which had been entered into by the other party, as the result of even innocent misrepresentation; he did not refuse to make provision for his wife out of her own fortune.

In all his book Professor Lévy-Ullmann displays a knowledge of the problems of English law and a familiarity with its literature which excite our respectful admiration, and raise the somewhat disquieting question whether there is now living any English jurist who has an equal familiarity with the problems of Continental law.

EDWARD JENKS.

THE DUAL JURISDICTION IN ZANZIBAR.[1]

STUDENTS of later generations are likely to compare with interest the diversity of the processes by which in our day the principles of Western legal administration and European law have become established in Eastern territories formerly ruled by native traditional systems of a very different social character. Confining our attention for the present purpose to countries in which the Islamic tradition has been dominant, we note that the first impact of European ideas in this connexion upon the native conceptions took place through the concession of capitulatory rights to groups of European residents, mainly commercial in character.

Gradually under the overwhelming influence of the energy and intellectual activity of Europe such life as remained in Moslem law has tended to wilt and dry up. We find so fundamentally Islamic a country as Turkey renouncing altogether the Moslem conception of society and adopting, at least in form, European administration and European law. It is, indeed, worth remarking that renunciation has been sometimes most complete where direct European rule has never been established. The effect of such rule has tended to a degree to be preservative in character. In Egypt the further penetration of European conceptions if not stayed was at least not seriously advanced in the legal sphere by the dominance of English power in the government. It is a matter for reflection that the Ottoman Capitulations should continue by custom and ecclesiastical courts should still be maintained in a country which for a longer period than any other in the Near East has been subjected to undoubted though veiled British rule.

The interesting and suggestive story of the relations between Moslem and European law and administration in Zanzibar is well told by Mr. Vaughan in the little book under review.

The story opens with the grant by the Sultan of Muscat of certain rights of jurisdiction over British subjects in 1822, enlarged in 1839 and again in 1886. In the meantime various Christian powers had obtained similar capitulatory rights.

The declaration of a British Protectorate in 1890 led eventually to further extension of British jurisdiction, of which the most remarkable feature was the delegation to the British Consul-General in 1892 of the Sultan's jurisdiction over cases in which " the plaintiff or complainant was subject to the jurisdiction of the Protecting Power and the defendant or accused was a subject of the Sultan or of a non-Christian power." This jurisdiction was thereafter exercised by British judges in a court termed H.M. Court of Delegated Jurisdiction.

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[1] *The Dual Jurisdiction in Zanzibar.* By J. H. Vaughan, Assistant Attorney-General, Zanzibar. (London : Crown Agents for the Colonies, 1935.) 10*s*. 6*d*.

The later history is set forth in an article contributed to this *Journal* in 1924 by the present Chief Justice of Tanganyika[1] from which Mr. Vaughan makes excerpts. In brief the absorption of the British Court of the Court of Delegated Jurisdiction in 1908 and the gradual surrender of foreign extraterritorial rights paved the way to reorganization. This took the form of the assimilation, not amalgamation, of the two remaining British and Zanzibar courts in 1923. Both orders of courts remain, but they have been made parallel in character and are presided over by the same officers.

In Part III of his book Mr. Vaughan deals with the Law of Zanzibar both as applied in the "Zanzibar" court and in the British courts. Up to 1908 the law of the former was the Moslem law which still remains the "fundamental law" of the territory. The question as to which of the prevalent schools, Ibathi or Shafei, is to be applied to any particular case is one of some difficulty and is discussed fully by the author. Moslem law has, however, been in great part superseded by Decrees of the Sultan incorporating English law and procedure.

The history of the law applicable in the British courts involves some consideration of the law of the Bombay Mofassal of which Zanzibar was previously treated as a district. This introduces us to some very intricate questions upon which Mr. Vaughan's remarks are of great interest. The present law is, however, regulated by the Zanzibar Order in Council, 1924, under which the Sultan's Decrees when countersigned by the British Resident have replaced the Indian law. Subject thereto the jurisdiction is to be exercised "in conformity with the substance of the Common law, the doctrines of Equity and the statutes of general application in force in England on July 7, 1897," a phraseology which, with variations, is familiar in Colonial Orders in Council. The bulk of the law applied in the British courts is to be found in the Decrees countersigned by the Resident, and to this extent the law applied in both orders of courts is the same. But while in the "Zanzibar" court the residuary appeal must be made to the Moslem law, in the British court it is to English Common law and Equity that the courts must refer to fill up gaps. In this connexion it is worth noting that rights and liabilities arising out of tort are in the British courts governed entirely by Common law principles.

In compiling this little book Mr. Vaughan has not only rendered service to the courts of the Protectorate, but has afforded to students a valuable illustration of the methods of Colonial administration and manifested the interest which Colonial civil servants take in their task.

F. M. G.

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[1] *Journ. Comp. Leg.*, Third Series, vol. vi, pt. iv, pp. 293 ff.

THE LAND LAW OF PALESTINE.

Dr. F. M. Goadby and Mr. M. Doukhan have rendered a service to students and practitioners in Palestine who needed an authoritative statement of the Land Law. The present volume[1] reproduces the privately circulated " Statement " which they issued through the Government of Palestine to officials and others interested some years ago, but now the revised work with additional matter bringing up to date and completing their task is available, we may say, for the first time to the general public ; for, though the authors mention in the introduction that the original statement made for official purposes was also eventually allowed to be sold, its publication was so little known, at any rate to anyone outside Palestine, that for practical purposes it did not exist for anyone unconnected with official circles.

The additional chapters are Nos. 15 dealing with the protection of agricultural tenants (which strikes one as interesting to readers outside Palestine) ; 17, Cadastral Survey ; 19, Expropriation of Land ; 20, Town Planning ; and 23, Taxation of Land. These chapters are naturally mainly concerned with Palestinian legislation modifying the Turkish Land Code and are, therefore, of little interest to possible readers outside that country, who will now find the publication easily obtainable. The references to legislation have been brought up to date, and in Appendix III there is a useful summary of cases concerning the Land Law published in the Palestine Law Reports, 1920–33, edited by the Chief Justice, but published too late for insertion in the text. The appendices, tables and index are very complete, but the list of " corrigenda " on p. 421 is quite inadequate and in any future edition there are many misprints other than those given which require correction.

The work is primarily intended for the use of those who practise the legal profession in Palestine, but it is worth while, perhaps, to point out that it may be found useful both in other countries than Palestine and also to students of comparative law generally.

The basis of land legislation in Palestine is the Turkish Land Code which was applicable, more or less (varying with the efficiency of government control and less so of course in districts which were distant from Constantinople or less settled), to the whole of the Ottoman Empire as it was before the war. The publication of this treatise on the Land Law of Palestine has consequently a wider interest than its title would seem to imply.

In the first place there are certain other regions, territories, like Palestine, detached from the Ottoman Empire under the Treaty of Lausanne where the Turkish Land Law is still in force, notably Cyprus and 'Iraq. In Cyprus this treatise, excluding of course such modifications as have been introduced by subsequent British legislation, might be used as a textbook for that part of Cypriot Law, for in that island the British authorities, more conservative in law-making than the Turkish Dictatorship, have preserved the Land Law which has been superseded in the country of its origin. In 'Iraq, in theory at any rate, the Land Code is still in full operation, though this was doubtless one of the distant and less settled parts of the old Empire where the Sultan's Iradés only applied with reservations. Art. 113 of the Law of the Constitution, 1925, says " Ottoman Laws published before November 5, 1914, and laws published on and after that date and which have remained in force in 'Iraq up to the date of the publication of this Law of the Constitution, shall remain in force, so far as circumstances permit, subject to modification or repeal, etc." This of course, includes the Land Code and the Medjelle (the old Turkish Civil Code based on Muhammadan Law). " So far as circumstances permit," which is a curious qualification to find in the text of this Article, presumably refers to the probability that the law could not be made applicable throughout the country any more than in Turkish times.

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[1] *The Land Law of Palestine.* By F. M. Goadby, D.C.L., and Moses Doukhan, O.B.E. (Tel-Aviv, Palestine.) £1 15*s*.

Further, lawyers in Syria, French or Syrian, who read English might also find the volume of service to them.

For the student of comparative law the appeal is still wider. In Turkey perhaps at the moment the interest, if any, would be only historical. Modern Turkey has substituted the Swiss Civil Code with hardly a single modification for the Medjelle, and presumably the Land Code disappears also with its incompatibility with the new law of property imported from abroad. How far the supersession is absolute Turkish lawyers seem themselves uncertain, and the impatience of the Turkish reformer found no time for explanatory notes or transition legislation to help to bridge the gulf between Eastern and Western legislation. The regard of the Turkish student is now forcibly directed to the future rather than to the past, but the time will come when, with greater freedom of thought permitted, the student of Turkish law will find an interest in the Land Code. The student of the history of Egyptian Law also should know something of the Land Law of Turkey for the sake of comparison with the system formerly applicable in Egypt. It is true that, as the authors point out in the Introduction, the Land Law of Turkey does not appear ever to have applied in Egypt ; but though Egypt since the days of Muhammad Aly till 1914 was only nominally under the suzerainty of Turkey, the influence of Turkish officials and Turkish ideas can be seen in the land law of Egypt. There are many points of similarity interesting to the student of comparative law, derived no doubt from the common origin of the systems from Muhammadan law, but in part attributable to Turkish influence. Further, students who would understand the existing law of property in Egypt, simplified since the introduction of the Codes of 1876 (Mixed Civil Code) and 1883 (Native C.C.) based on the French Civil Code, need some acquaintance with the earlier history of the land law in order to explain such expressions used in those

Codes as Mulk, Kharadji Lands, Moubah, Abadieh, etc. There are also other points to which the attention of students of comparative law could be drawn, as, for example, the similarity between Hikr and the contract of Ijaratein (see pp. 10 and 74).

It would seem, therefore, that there should be a certain demand for the very admirable work of Dr. Goadby and Mr. Doukhan even outside the circle of lawyers in Palestine to whom it is principally addressed.

W. H. Hill.

THE NEW DEAL.

This little book,[1] written by the McCormick Professor of Jurisprudence in Princeton University, as the Storrs Lectures for 1934, will be welcomed by English lawyers, who have been not a little puzzled by some of the legal aspects of President Franklin Roosevelt's policy. Wearing, as this policy does, some superficial resemblance to European Fascism, it is obvious that it differs *in toto* from the policy both of Herr Hitler and even of Signor Mussolini, by the fundamental fact that it has hitherto proceeded, not merely with the forms of legality, but with a total absence of resort to physical force. That fact is, of course, sufficient to awaken the friendly interest of Englishmen. But, while the layman may be content to note the fact, the lawyer will be concerned to trace the methods by which this remarkable feat has been achieved ; and this, quite apart from the political and economic issues involved. Whether or not the President's policy is sound from these latter aspects is, of course, a vast question, upon which the Englishman, if he is prudent, will for some time be content to reserve judgment. Meanwhile, the smaller question with which Professor Corwin is concerned may well be discussed ; and his book, despite its somewhat suggestive title, is written with a clarity and fairness which will command respect. Moreover, his examination of the subject cannot fail to be suggestive to every student, and especially to the English student, of comparative law.

Perhaps the most obvious result which emerges from a first reading of this book is a striking confirmation of the belief held by more than one careful student of Constitutional Law, that the rigidity of a so-called "written" Constitution is far less than was at one time commonly believed. Needless to say, there have been earlier occurrences in American constitutional history which have pointed to this conclusion—notably the fate of the Presidential Electoral College, which, despite the clear intentions of the founders of the Republic, has long ceased to have any genuine existence. But what are we to say when the even more fundamental doctrine of the "separation of powers" appears from Professor Corwin's book to have been, almost from the earliest days of the Republic, the subject of so much difference of opinion that its enforcement has been almost impossible? For first we have the famous rivalry between the view of Hamilton, that the ultimate foundation of the Republic is the national will, to which everything must be subservient, and the view of Madison, known as " dual federalism " and strongly supported by the form of the Constitution, which maintained that the Republic was a compact of States, each having equal rights which could not be overridden even by an overwhelming majority among its co-partners. Then we have the issue of Property versus Democracy which Professor Corwin handles in his second chapter, and which raises the question whether the sacrosanct rights of property and contract, enshrined in the forefront of the Constitution, are to be jealously guarded by the Supreme Court or liberally interpreted by Congress and the States Legislatures—a question which raises important problems, not merely of Constitutional Law, but of Jurisprudence. Once more, it is interesting to find a prosaic President, like the late Calvin Coolidge, so recently as 1919, asserting that: " men do not make laws. They do but discover them," and so reviving the old plea of Harrington, in his *Oceana*, for " a government of laws and not of men," thus placing severe restriction on legislative activity. Finally, we have the question, so vital to the situation of to-day, whether, in confiding to the President the executive power, the Constitution merely entrusts him with the carrying out of the decrees of the legislature, as Jefferson maintained, or by implication vests him with the historical " prerogatives " of the British monarch, described by Locke as the power " to act according to his discretion, for the public good, without the prescription of the law and sometimes against it." Surely no interpreter of an " unwritten " Constitution was ever faced with greater problems.

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[1] *The Twilight of the Supreme Court: A History of our Constitutional Theory.* By Edward S. Corwin. (Newhaven : Yale University Press ; London : Humphrey Milford, 1934.) Pp. xxviii + 237. English price 11*s*. 6*d*. net.

But, of course, as the title of his book implies, Professor Corwin is mainly concerned with the relation of the Supreme Court to President Roosevelt's policy. As every student of comparative law knows, the Supreme Court is placed by the Constitution of the United States in a position so powerful that Tocqueville, the first systematic European exponent of that Constitution, could write of it as an " aristocracy " (meaning a form of government), and that, in the memory of the writer of this review, it was at one time possible to argue with acceptance that the " sovereignty " of the United States resided in that august tribunal. This was manifestly an error; for a power whose action is, at least in form, purely negative can never embody the conception of Austinian sovereignty. Nevertheless, it is obvious that a small body of men, holding office for life, and having behind them the immense prestige of an authoritative document such as the Constitution of the United States, could, if they chose to run the risks involved in such a course, practically wreck a policy like the New Deal, by declaring unconstitutional the bulk of the revolutionary statutes accepted by Congress on the demand of the President. It is true that the majority of these statutes are, in fact, what we in this country should call " Finance Acts," and that the Constitution confers upon Congress the power to

" levy and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." But then there are grave doubts as to whether the interpretation of the words " general welfare," in themselves so comprehensive, is not substantially restricted by other clauses which follow the words quoted above. Again, to leave purely legal for political considerations, while it is supposed to be a welcome task for members of Congress to vote money to be expended amongst their constituents, there must come a time, even in a country possessing the gold reserves of the United States, when, if this task is too generously carried out, taxation, as its necessary concomitant, will be necessary, on a scale and by methods likely to provoke controversy of an acute kind, notably in connexion with the question of a Federal income-tax. And so it is not quite certain that, in the event of a struggle between the President and the Supreme Court, the former would win.

Readers of Professor Corwin's book will find, in addition to his treatment of the fundamental questions above indicated, useful explanations of phrases, intelligible enough to his own countrymen, but rather puzzling to the ordinary Englishman, such as " judicial review," " due process of law," " police power " (which has nothing specially to do with what we understand by " police "), and the like. We could wish, however, that such mysterious symbols as " Nira," "A.A.A.," etc., were at least once given in their extended form in Professor Corwin's text, instead of only in his Index.

Finally, we may, perhaps, venture to suggest that, in view of events which have happened since Professor Corwin's book was published, the implication embodied in the first part of its title may ultimately prove to have been somewhat premature.

E. J.

UNCONSTITUTIONAL STATUTES.

This book[1] is of interest as illustrating an important aspect of the working of the United States Constitution—one which is of acute importance at the present time, in view of the ruling of the Supreme Court, by a unanimous opinion, against the validity of the delegation of code-making power to the President under the National Recovery Administration Act.

Professor Field, by this timely publication, has produced a thesis examining the modifications, to be found in the decisions of American courts, of the uncompromising rule of invalidity in relation to unconstitutional statutes. There are several rules, or views, and all courts have applied them at various times and in differing situations. Nor do all courts agree upon the applicability of any particular rule to a specific case. The author, after explaining three views—Voidness *ab initio*,

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[1] *The Effect of an Unconstitutional Statute.* By Oliver D. Field, M.A., LL.B., S.J.D. (The University of Minnesota Press, Minneapolis, 1935.) Pp. xi + 326 + 28. $5.00.

Presumption of Validity, and Case to Case—and the historical and doctrinal basis of each, proceeds to examine a large number of cases of invalidity of statutes relating to the status of private corporations, of municipal corporations and of persons in an official capacity. He discusses also in detail the doctrine of judicial precedent in relation to constitutional law, mistake of law and the recovery of unconstitutional taxes, and finally examines judicial review as an instrument of government. One aspect of the last-named topic—the function of judicial review in enforcing the constitutional distribution of powers territorially—must have been closely watched of late by the President and his advisers at Washington. One of the chief weaknesses of judicial review, as it is exercised in the State and Federal courts, appears to lie in the fact that many constitutional problems of government are brought before the courts by private litigants, though they raise issues of governmental power which are not primarily concerned with individual rights ; from this category may be excepted cases concerning bills of right guaranteeing liberty to the subject against the Executive. The Poultry Code case, which seems likely to impede, if not to wreck, the N.R.A. codes, would appear to be a striking illustration of this feature, which is not, of course, unknown in England ; indeed, it is an inevitable feature of any judicial system which is based upon the protection of the individual and has little, if any, machinery or qualification to adjudicate upon the broader views of modern governmental policy. It is really an argument for specialized courts, such as the Railway and Canal Commission, which is by statute concerned with policy embodied in enactments which have, unlike similar measures on the other side of the Atlantic, nothing to fear from the doctrine of invalidity.

The author's conclusions can profitably be studied by those who have no immediate concern with the working of the Federal system in the United States. They amount to a plea for the improvement of the technique of judicial review in governmental matters. Administrative review is to be preferred for some purposes, but it cannot afford the flexibility which is possible under judicial review, provided that the latter is exercised in a form which gives recognition to the fact that the courts are sharing in the work of government, and that their task is to make a statute operate intelligently and not merely to give a negative answer as to its validity at the suit of a single individual.

E. C. S. W.

TOWN-PLANNING.

This is the seventh volume[1] in a series entitled "Harvard City Planning Studies"—the outcome of much serious and skilled research work on the part of a group of persons connected with Harvard University. The series includes volumes dealing, respectively, with Airports—their location, administration and legal basis ; Building Height, Bulk and Form—how Zoning can be used as a protection against uneconomic types of buildings on high-cost land ; Neighbourhoods of Small Homes—economic density of low-cost housing in America and England ; Urban Land Uses—amounts of land used and needed for various purposes by typical American cities ; Transition Zoning ; and The Design of Residential Areas—basic considerations, principles and methods.

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[1] *Model Laws for Planning Cities, Counties and States, including Zoning, Subdivision Regulation and Protection of Official Map.* By E. M. Bassett, F. B. Williams, A. Bettman and R. Whitten. (Harvard University Press ; Oxford University Press, Amen House, Warwick St., E.C.4, 1935.)

The wide field of Planning principles and practice thus covered by preceding publications is " rounded off " by the present work on Model Laws for Planning Cities, Counties and States. In this four experienced " collaborators " set forth their views on Zoning, Subdivision Regulation and the Protection of the Official Map, in a " general discussion " in each case, followed by a set of suggested " legislative forms." These " discussions " and " forms," though showing close agreement as to the objects of planning, disclose different views as to the method by which those objects can best be attained. Two of the learned " collaborators " hold that progress in planning should be by cautious and moderate steps, in order to take full advantage of advances already made, without endangering present gains by risking adverse decisions. The other two assume " that the concepts of planning are sufficiently valid and possibilities of its benefits sufficiently great and realizable to justify giving its technique and procedure a more emphatic place in the structure and methods of legislation and of administration in local government."

The " legislative forms " prepared by Messrs. Bassett and Williams include : a Municipal Zoning Act—relating to the regulation of the height, bulk and use of buildings, and the density of populations ; a Municipal Planning Act—to preserve the integrity of mapped streets, and to secure parks, using for these purposes a planning commission ; a County Planning Act—enabling counties to preserve the integrity of mapped county highways and " freeways," to determine the location of county parks and to co-ordinate development within the county, using for these purposes a planning commission ; and, lastly, a State Planning Act—to preserve the integrity of mapped State highways and " freeways," to determine the location of State parks, State public reservations and sites for State buildings, and to co-ordinate development within the State, using for these purposes a planning committee.

The " legislative forms " prepared by Mr. Bettman as included in this volume comprise : an Act providing for municipal planning, and the creation, organization and powers of municipal planning commissions ; an Act providing for the zoning of municipalities, and the regulation of the location, height, bulk and uses of buildings and the uses of land in municipalities ; an Act providing for the regulation of the subdivision of land in and around municipalities ; an Act enabling municipalities to preserve the integrity of municipal plans by the regulation of buildings in mapped streets ; an Act providing for county and regional planning, and the creation, organization and powers of county and regional planning commissions; a County and Regional Zoning Act; and a County and Regional Subdivision Regulation Act.

It will be seen from the above recital what an immense and varied range of suggested legislation—much of it based on existing models—is covered by the learned authors of this work. The book, with its "legislative forms" and explanatory "discussions," is a veritable mine of material for all interested in the progress of planning, whether in this country or elsewhere, and is obviously the result of patient and prolonged research on the part of the four experienced "collaborators" who have combined to produce this unique and valuable work on Model Planning Laws.

R. C. Maxwell.

LAW AND ORDER IN POLYNESIA.

The principle of the reciprocity of social obligation among primitive peoples put forward by Professor Malinowski in his *Crime and Punishment in Savage Society*, in regard to the Trobriand Islanders of Melanesia and familiar to readers of this *Journal* through Mr. J. H. Driberg's article on "The African Conception of Law,"[1] is here applied by Dr. Hogbin in his study of the social organization and legal machinery of Polynesia.

This book[2] combines the detailed study of a single small and isolated Polynesian community inhabiting the coral atoll of Ontong Java, in the Western Pacific, with a comparative survey of such information as has been gathered by other writers regarding the relatively highly developed systems of the much larger populations of Hawaii, Tonga and Samoa. It is Dr. Hogbin's opinion that "the failure to perceive the existence, in primitive communities, of any law other than measures of repression against violence has been due mainly to a too narrow conception of law, as consisting in a body of rules expressly laid down and enforced by institutions existing for the purpose." It is, therefore, on the forces making for order in accordance with the dictates of self-interest rather than on those of a superimposed law that his main emphasis lies, and the theme running through the entire work is that of "the reciprocal nature of all social co-operation," whether this be between individuals, between groups, as in the complicated organization of give and take between the relatives of husband and wife and of parents-in-law and children-in-law, between the individual members of a group such as a house-owning or canoe-owning group, between the headman of a patrilocal joint-family and its members, or in the larger communities such as that of Hawaii between the king and the various grades of a highly developed feudal system and those situated below them in the social hierarchy.

There being, however, no such thing as Durkheim's supposed "collective consciousness," the individual is apt from time to time to find his desires opposed to those of the community, but Dr. Hogbin's point is that " when a person forgets his obligation he is penalized, not through external forces, but through the workings of the same machinery which normally satisfies his rightful claims." Concrete examples are cited to substantiate this thesis which, in respect of the simpler societies, few practical ethnologists would dispute. More serious breaches of social order such as theft, disobedience to authority, in the shape of the headman of the joint-family, or, conversely, abuse of his authority, are dealt with by such methods as private murder (for adultery), public banishment, bound exposure to the sun, compensation by gift of goods, etc., all of which are discussed in detail with a view to showing that these are necessary measures directed towards the re-establishment of equilibrium within the affected group. Such measures are, however, of relatively rare occurrence when compared with the supposed ceaseless operation of the spirits of ancestors who are believed to watch over the social order and punish offenders by inflicting sickness or death. " The belief in immortality thus plays its part in securing the execution of obligations." Here, again, however, " religion reflects rather than dictates social relationships," and the voice of the medium, through whom the spirits are supposed to speak, is shown to be " in reality . . . the voice of society."

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[1] *Journ. Comp. Leg.*, Third Series, vol. xvi, pt. iv, p. 230.

[2] *Law and Order in Polynesia.* By H. Ian Hogbin, M.A. (London: Christophers.) Pp. lxii + 296. 12*s.* 6*d.* net.

With regard to his main thesis of underlying reciprocity there is little to cavil with Dr. Hogbin's well-substantiated conclusions. These represent the constructive side of Dr. Hogbin's work. The rest of the section on Ontong Java is devoted to a short account of such information as he was able to gather regarding the formal temple religion, as distinct from the worship of the more immediate ancestors, and of the kingship. These again are seen to be unifying forces for a yet larger group comprising the entire population. In dealing with this part of his material, however, Dr. Hogbin shows himself an apt pupil of the so-called " functional " school of anthropology in ignoring every indication of the processes of cultural evolution. We are told, for instance, without any evidence given to substantiate the statement, that kingship in Ontong Java " is a comparatively recent institution," in spite of the fact that this institution lies at the basis of all Polynesian society and that what he refers to as the " establishment of the kingship " together with an apparently ready-made " army " is in point of time the earliest social phenomenon mentioned anywhere in the book. No mention is made of the fact that in the word for king, *heku'u*, the initial syllable is a separable particle and the word *ku'u* is the same, through recognized sound-changes, as the Tongan *tu'u* and the Fijian *tu*, both meaning " to stand," the latter also signifying " chief " or " king," thus linking up this institution with the highly developed aristocratic system discussed by Mr. A. M. Hocart in his well-known work on " Kingship." The obsession of this school with the word " primitive " and with an erroneous conception of the development of all institutions *in situ* gives rise to the further astonishing statement that " as the king became more and more powerful . . . the idea of the king's peace was *created*." The italics are mine, and emphasize the complete inversion of historical process put forward in a book in which both author and the writer of the introduction go out of their way to inveigh against " fanciful reconstructions of history " and " questionable reconstructions of the past." Had the author indeed carried out the " carefully planned comparative investigation of human institutions in their context " to which Professor Malinowski somewhat surprisingly refers in the initial page of his long and highly controversial introduction, it might have occurred to him that yet other features of culture in Ontong Java may not be so very " primitive " after all, and that, far from the headmanship of joint-families with its priestly function and punitive powers being the prototype of kingship, it may with greater probability be its miniature reflexion.

These remarks will, however, appear irrelevant to Dr. Hogbin, who chiefly confines himself within the narrow limits of existing social structures, and is uninterested in the question of how these came into being. Such studies are useful so long as the limits set are fully recognized. It is, however, necessary to bear in mind the fact that no culture is static and that no study of human institutions is complete which does not take into account those processes of fusion and degradation which play such a large part, in the Pacific as elsewhere, in the formation of existing cultural patterns.

The book is furnished with a good bibliography but indifferent index. The criticism levelled in the introduction against views alleged to be held by Professor Radcliffe-Brown have been replied to by him in *Man*, vol. xxxv, no. 48.

John Layard.

LAW AND THE SOCIAL SCIENCES.[1]

The relationship between law and other branches of knowledge will always be a fascinating study. Rarely does legal science pursue an entirely independent course. If Austin succeeded in separating law from ethics he did so with the aid of a political theory of sovereignty borrowed from Hobbes and Bodin : the modern Viennese school of legal purists base their purity on a theory of knowledge derived from Kant. The question of the proper relationship of law to other sciences therefore arises, and raises a bigger question than that of the unity of the social sciences. A whole philosophy of the sciences is involved.

It is with the lesser question, however, that Mr. Cairns concerns himself, and his work gains in value from its concentration of purpose. Five of the social sciences—anthropology, economics, sociology, psychology and political theory—are examined, to see what contribution they can make to legal science, whether to its basic theoretical assumptions or to the progressive modification of the actual rules of law. The literature discussed is chiefly Anglo-American, the legal system envisaged is chiefly that of the United States, but within this field the author may be satisfied that he has fulfilled the task he set himself and has performed a most valuable piece of exploratory work. In general his counsel is caution : where other sciences are not unanimous in their verdicts it would be rash for lawyers to accept their conclusions. Thus the hothead is restrained, but the legislator, the judge and the legal reformer are given ready clues to such material worked out by the other sciences as is a finished product available for use.

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[1] *Law and the Social Sciences*. By Huntington Cairns. Foreword by Roscoe Pound. Included in the International Library of Psychology, Philosophy and Scientific Method. (London : Kegan Paul, Trench, Trübner & Co. Ltd. ; New York : Harcourt, Brace & Company). Pp. xiv + 279. 12*s*. 6*d*.

" No longer," says Mr. Cairns, " does the jurist regard law solely as a self-contained system of thought . . . which can be developed from a few premises to meet all exigencies." This is true enough, but it is important to realize where the emphasis in this statement lies, or ought to lie. It is not that law is no longer a distinct system of thought, but that the premises from which, and the processes by which, it is derived are no longer few. The premises grow as precedents pile up and the bulk of social legislation increases, the processes widen down from pure logic to historical interpretations and considerations of social purpose. It is in the understanding of social purpose and social function that jurists have much to learn from the other social sciences, and, as the author is at pains to point out, the other sciences are capable of rendering yet greater services to the law. By his suggestions for mutual help between law and the social sciences Mr. Cairns has established himself as a worthy pioneer and a decidedly honest broker.

B. E. K.

INTRODUCTION TO FRENCH LAW.

It is the design of this book [1] to offer to English readers a general account of the principles and institutions of French law classified in France under the head of " *droit civil*," that is, the body of rules contained in the Napoleon's *Code Civil* (1804), and also some of the rules which have place in the other branch of French law termed " *droit commercial* " (*Code de Commerce*, 1807), together with complementary statutes of the nineteenth and twentieth centuries on the same or connected subject-matters of both.

The volume is primarily written for the use of English practising lawyers. " As international commerce, mixed marriages, foreign investments and foreign travel increase, the occasions are ever multiplying on which the English practitioner finds himself brought into contact with continental, and particularly with French law, and its numerous congeners all over the world" (c. i, p. 1). It does not purport to serve as a textbook, but may rather be described as a "guide to the drafting of cases for opinion on French law." Moreover, the authors also express their hope that it may be of some interest to readers whose concern with the law is more general, and not without value for the student of history or of the social and political sciences.

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[1] *Introduction to French Law*, by Sir Maurice Sheldon Amos, K.B.E., K.C., Quain Professor of Comparative Law in the University of London, Licentiate in Law of the University of Paris, and Frederick Parker Walton, M.A. (Oxon.), LL.B. (Edin.), Hon. LL.D. (Aberdeen and McGill), Hon. Fellow, Lincoln College, Oxford ; sometime Director, Royal School of Law, Cairo ; Member of the International Academy of Comparative Law (The Hague). (London: Humphrey Milford, Oxford University Press. 1935.) Pp. xii + 393. 21s. net.

After a "General View" covering about thirty pages, the book is divided into a series of chapters respectively dealing with Persons, Domestic Relations, Property and Real Rights, Obligations in General, Contracts, Quasi-contracts, Torts, Presumptions of Liability and Compensation Laws, Rights of Creditors, Matrimonial *Régimes*, Succession and Commercial Law. A good Bibliography, a list of the articles of the Codes which are referred to, a second list of other laws cited, as well as a full Index, make it easy to find what the book contains. There is no index of cases, because French cases are seldom designated by the names of the parties.

An exceedingly interesting portion of the work is the "General View" (chap. 1). The exact definitions of the domain of French law, the limits of the field of codified law, the precision of the authority of decided cases in France, the authority of legal textbooks, the sources from which the French lawyer is to look for material on which to base an opinion, whether as counsel or as judge, the traditional importance of *ratio legis* in the French legal system, the reasons why there is in French civil law no such distinction as that between rights in equity and rights in law—all topics in connexion with which the comparison with the English legal system is carefully pointed out—are among the best pages of the book. Very convenient also are the remarks in § xi commenting upon certain terms and concepts of general application in French legal terminology ("*Patrimoine*," "*droits réels*," "*droits personnels*," "*actes juridiques*," "*Titre universel et titre particulier*," "*Prescription*"), and in § xii, where the "*acte authentique*," an institution of outstanding importance in French law, is clearly defined and the nature of the "*acte notarié*" described, and illustrated in an amusing manner by a hypothetical transaction, in which "Maître Alcide Dupont" (a well-known name in our country), "notaire," receives a conveyance of land from "M. Jules Clémenceau," the vendor, and "M. Joseph Poincaré," the purchaser. A short history of the French law from the Roman period up to the Napoleonic codification concludes a very noteworthy introductory chapter.

HENRI LÉVY-ULLMANN.

To this general description of the book under review Professor Lévy-Ullmann adds the following observations:

La tentative de MM. Amos et Walton appelle les vœux les plus sincères de réussite, et il est grandement à souhaiter qu'elle atteigne au

maximum le public qu'elle a voulu toucher. En effet, comme ils l'écrivent très justement, " to become familiar with the law of France is to learn a *lingua Franca*, and to be initiated into ideas which are common to the whole non-Anglo-Saxon legal world, with the possible exception of Russia and of those countries which have hitherto resisted European influence." Oui, le droit civil français constitue la clef de ce qu'on peut appeler " le système juridique continental," dans lequel rentrent tout naturellement le droit allemand et les autres droits codifiés au XX^e siècle, qui ne sont, eux aussi, que des prolongements du droit romain avec quelques variantes dues à des interventions scientifiques ou à des apports de droits locaux sans grande portée quant à l'ensemble. Tout cela, comme le désigne si bien l'expression anglaise, généralisant avec un instinct juridique très sûr, c'est du " *civil law*," c'est-à-dire du droit de souche romaine adapté aux besoins des sociétés de nos jours. Le " *droit civil* " français est l'essence même du " *civil law*."

Et peu de lawyers étaient mieux qualifiés que nos auteurs pour en exposer les fondements, eu égard au contact dans lequel ils ont vécu pendant nombre d'années de leur existence avec ce " *civil law*," notamment au Canada, en Egypte et aussi en Ecosse. Ces vues extrêmement exactes donnent à leur livre une valeur toute particulière, que doublent une clarté parfaite et une sûreté de méthode auxquelles un " continental " est heureux d'applaudir.

A ces observations d'ordre général, il convient maintenant d'ajouter quelques réflexions, d'un point de vue plus strictement français.

Et tout d'abord, il y a lieu de remarquer—comme le fait ressortir la Bibliographie qui figure en tête du volume—que notre littérature juridique française ne compte aucun livre du genre de celui que nous analysons présentement, c'est-à-dire un exposé, en un seul volume, du droit civil français, suivi de quelques principes de droit commercial. Pareil ouvrage est absolument inconnu en France, si étrange que la chose puisse paraître. Le motif en est que les classiques commentaires du droit civil et de droit commercial (sous les noms variés de *Précis*, *Manuel*, *Traité élémentaire*—abstraction faite des grands *Traités* allant de 8 à 30 volumes et plus) et même les simples " Mementos " en vue de l'examen (le " Nutshell " des apprentis barristers anglais) sont tenus de se modeler sur la progression des programmes universitaires, pour la satisfaction de la clientèle des étudiants auxquels ils sont presque exclusivement destinés. Or l'enseignement du droit civil est, dans nos Facultés de droit, réparti en trois années universitaires consécutives pour les études conduisant à la licence en droit (le grade qui ouvre les carrières juridiques), ou en deux, pour la simple " Capacité en droit " (le diplôme le moins élevé), et le droit commercial fait l'objet d'un enseignement à part, portant sur une année. D'où l'usage, dès la seconde moitié du XIX^e siècle (depuis les Précis de Mourlon et de Baudry-Lacantinerie jusqu'à ceux de Planiol et Ripert, de Colin et Capitant, de Josserand) de publier ces ouvrages en trois volumes pour le droit civil, et en un volume pour le droit commercial (Lyon-Caen et

Renault, Thaller et Percerou). Quant aux praticiens du droit, chez nous, ils ne s'embarrassent guère d'ouvrages de doctrine. Ils vivent sur leurs souvenirs d'études (parfois bien sommaires) et, en cas de besoin, ont recours aux "*Répertoires*" (ex: le *Répertoire pratique* de Dalloz) qui jouent pour nos hommes de loi français le même rôle que les *Laws of England* d'Halsbury de l'autre côté de la Manche.

Le livre des professeurs Amos et Walton sera donc considéré en France, même de point de vue français, comme une nouveauté. Il attirera certainement la curiosité et suscitera un vif intérêt. Mais, en second lieu, à d'autres égards, il rendra aux juristes français un important service. Car—et sans crainte d'être accusé de paradoxe—on peut affirmer qu'il servira en outre à mieux faire connaître dans notre pays le droit de l'Angleterre et le système juridique anglais. En effet, soit dans les divers paragraphes du Chapitre d'Introduction ("A General View") signalés plus haut, soit à maints autres endroits de leur ouvrage, les savants auteurs, afin de mieux faire comprendre à leurs lecteurs de langue anglaise les particularités du droit français, comparent nos institutions, nos règles positives à celles qui sont en vigueur de l'autre côté du Channel, et c'est cette comparaison même qui, pour nous, est précieuse et instructive au plus haut degré.

La publication de cette "Introduction au droit français" rentre dans une catégorie d'études comparatives particulièrement recommandables à l'heure présente. De même qu'il est nécessaire que, dans chaque pays, des juristes de renom prennent la peine d'exposer dans un ensemble clair et synthétique—pour les faire mieux connaître d'abord chez eux, au grand public, et ensuite au dehors, à l'étranger—la substance des lois de leur propre pays (comme l'a réussi si brillamment notre excellent ami le Doyen Edward Jenks, dans son inappréciable *Book of English Law*, et comme tente de le réaliser, en France, grâce à d'éminentes collaborations étrangères, la série qui a pour titre: *la Vie juridique des peuples*), de même il n'est pas moins indispensable que des juristes étrangers décrivent ce qu'ils croient discerner et écrivent ce qu'ils pensent relativement aux droits qui sont en vigueur au delà de leur propre frontière, notamment des Anglais sur le droit français et des Français sur le droit anglais. En dehors du bénéfice technique que les hommes de loi en retireront pour le perfectionnement de leurs personnelles connaissances, il n'est pas d'œuvre qui puisse mieux contribuer, en facilitant leur mutuelle intelligence, à la cause sacrée du rapprochement entre les peuples.

FRENCH LAW.

MR. AGHION'S book[1] has a very wide scope. It aims at providing an Englishman who is going to carry on business in France or with French citizens with such information about French law as would appear to be useful for such purpose. The book is therefore concerned

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[1] *French Law as Applied to British Subjects and Companies.* By R. Aghion. (London: Stevens & Sons, Ltd.) Pp. xv + 144. 10s.

as well with French municipal law on marriage, divorce, contracts and torts, as with French rules on conflict of laws, companies, bankruptcy, civil procedure, labour provisions and taxation. Chapter I (4½ pages) gives us even a short account of the history and sources of French law.

It is clear that the author, in the 103 small-sized pages of his book (the 41 subsequent pages of the book are only documents) has not intended to write an exhaustive compendium of the French laws, but it is very doubtful whether the book, as it is, is calculated to serve any purpose at all. The developments dedicated to the various subjects are necessarily so summary as to be frequently positively misleading. Chapter I might best be used to illustrate that criticism. In Chapter XVII, dealing with French Law Courts, there is no reference whatever to the Conseil d'Etat, though many of the questions dealt with in the book will come within the jurisdiction of that Court and not of the Court of Cassation.

Much confusion will also be caused by the terminology used by the author, who has, for instance, translated "dol" by "fraud" (p. 67), "tribunal de droit commun" by "Common Law Courts" (p. 85), and "tribunaux d'exception" by "exceptional Courts" (p. 88). The judges ("magistrats") have become magistrates, the "juge de paix" is a Justice of the Peace, and the "notaires" are notaries.

The Table of Cases and Courts, without the slightest justification, puts on a different footing the Cour d'Appel of Paris and the other Cours d'Appel of France (p. viii). Other mistakes might be cited without any difficulty. There are very few misprints.

R. D.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE.

THIS is the most exhaustive treatise[1] on what may be called the static aspect of the Permanent Court of International Justice, as distinguished from its activity in the field of the application and the development of international law. Within these limits it is also the best book on the subject. It gives the student a very adequate historical background in scholarly chapters on the Permanent Court of Arbitration, International Commissions of Inquiry, the Central American Court of Justice, the International Prize Court and Court of Arbitral Justice as proposed at the Second Hague Conference in 1907. The author then proceeds to give a detailed account of the establishment of the Court, of the discussion of the individual Articles of the Statute by the drafting committee of jurists appointed by the Council, and of the attempted revision of the Statute in 1929. In this connexion he traces the history of the attempts made to effect the adherence of the United States to the Court. Part III is devoted to the organization of the Court. It includes chapters on the election of members of the Court, on the rules of the Court, its Registry, and finances, on the privileges and immunities (there is no convincing reason to call them " diplomatic ") of the judges, and on some problems of the Court's organization. Part IV deals with the contentious jurisdiction of the Court under various treaties and under the Optional Clause, as well as with its advisory jurisdiction. In Part V the author gives a picture of the oral and written procedure and of the practice of the Court. In the last part he discusses the law applicable by the Court and the way in which the Court has interpreted treaties.

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[1] *The Permanent Court of International Justice.* A Treatise. By Manley O. Hudson. (New York: The Macmillan Company, 1934.) Pp. xxvii + 731. 25s.

The treatise is written in a clear and concise manner, and the student will have no difficulty in following the more intricate questions—possibly with the single exception of the account of the fate of the revision of the Statute of the Court in 1929. In that connexion the reader ought to be told there and then in what manner the League and the Court surmounted the difficulties created as the result of the failure of the Protocol of Revision to enter into force. The account of the various problems is on the whole informative and based on the practice of the Court or of the competent organs of the League. In the overwhelming majority of cases this is the proper and obvious course, but in others a bolder method is perhaps called for. Thus, for instance, the question whether unanimity is required for a request for an advisory opinion is discussed with a wealth of detail, drawn from the practice of the Council, which will be greatly appreciated by every student of the subject. But that practice points to no clear solution, and the critical part of Professor Hudson's discussion of this subject is not as suggestive as might be desired. The same applies to the discussion of the scope of the Court's jurisdiction under the Optional Clause. Professor Hudson is not impressed by the recent criticism levied against the institution of national judges, but, without explaining the apparent inconsistency, he admits that " as a rule . . . judges *ad hoc* have not failed to support the position of their Governments, even when this placed them in a minority of one " (p. 338).

Professor Hudson has not stopped short of an account of the Statute of the Court as illustrated by its practice. For he concludes the treatise with a discussion of the interpretation of international engagements by the Permanent Court. It would perhaps have been preferable to include the substance of that chapter as part of a more comprehensive picture of the application and development of international law by the Permanent Court. Undoubtedly the interpretation of treaties has constituted a prominent feature of the work of the Court, but it may not be desirable to create the impression that it is the most important aspect of the Court's work. Moreover, the chapter as it stands may not be the best example of the way in which the Court's contribution to the development of international law ought to be presented to the student. A critical and analytical approach may here yield illuminating results. No one would be better qualified to attempt that task than the author, who has been one of the most conscientious and best-informed students of the work of the Court since its inception. But some of the promising titles of the chapter on International Engagements do not live up to the expectations raised by the general language of the heading. To give one example, the section on *travaux préparatoires* is little more than an enumeration of decisions. It fails to reveal the real attitude of the Court in the matter and the interesting development through which the Court has gone on this question. Under the influence of the view that the admissibility of preparatory work is yet another instance of the alleged fundamental difference between the Continental and the Anglo-American schools of thought, it began with a purely negative attitude towards *travaux préparatoires*. That attitude then underwent conspicuous and significant changes, and the most recent pronouncements of the Court affirm in unequivocal language the admissibility of this particular instrument of interpretation. However, these doubts as to one chapter of the book do not derogate either from its value as a whole or from the debt of gratitude which every student of international law owes to Professor Hudson for putting at the disposal of the profession a book which is a mine of accurate, well-presented and in many cases not easily accessible information. The treatise embodies the results of work extending for over fifteen years ; it is distinguished by scholarly thoroughness and economy of expression ; it is and very likely will remain for some time the leading exposition of the organization, the jurisdiction and the procedure of the Court.

H. L.

WORLD COURT REPORTS.[1]

THESE volumes inaugurate a series of World Court Reports intended to be continuous. They contain a collection of the judgments, orders and opinions of the Permanent Court of International Justice, and are designed to serve a purpose similar to that served by *The Hague Court Reports*, edited by James Brown Scott (two volumes published by the Carnegie Endowment for International Peace, 1916 and (second series) 1932) and *The Hague Arbitration Cases*, edited by George Grafton Wilson (published by Ginn & Co., Boston, 1915). The editor explains in his preface to Vol. I that, although the Permanent Court of International Justice is probably the best-documented public institution in the world, its publications consisting of some 150 volumes, these are too complete for convenient handling. There has previously been no exclusively English publication in which the Court's entire jurisprudence is contained, and the present work fulfils a useful need in this respect and in furnishing a history of the cases it contains, both before and after the Court has dealt with them. This cannot always be obtained from the Court's own publications.

Vol. I contains the texts of the various instruments upon which the Court's existence and maintenance depend, such as the Covenant of the

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[1] Vols. I and II edited by Manley O. Hudson. (Washington : Carnegie Endowment for International Peace, 1934.) Vol. I, pp. xxix + 777. $5. Vol. II, pp. xviii + 870. $3.

League of Nations and the Statute of the Court. To these have been added, for ready reference, certain tables of information concerning the Court, the editor promising that similar materials will be published in later volumes, as the need arises. Volume I also contains the judgments, orders and advisory opinions in cases begun before the Court during the period from the inauguration of its work in 1922 to the end of the year 1926, Vol. II covering the period from 1927 to 1932. The latter volume follows closely in arrangement Vol. I. The numerous citations by the Court or the judges in the judgments and opinions reproduced in Vol. II have been thought to call for a list of cases cited. In that respect only has a departure been made from the original arrangement.

Professor Hudson is particularly well qualified to edit these reports. In addition to being Professor of International Law at Harvard Law School, he is a member of the Permanent Court of Arbitration. Since the beginning of the Permanent Court of International Justice he has been a close student of its activities and has contributed an annual survey of the Court's work to the *American Journal of International Law.* He recently published a comprehensive treatise on the jurisdiction, procedure and practice of the Court.[1]

Mr. James Brown Scott, in his Introduction to Vol. I of Professor Hudson's Reports, refers to Art. 59 of the Statute of the Court which provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case." He considers this an imperfection in the statute, and extols the virtues of precedent. Obviously an advocate of the English doctrine of judicial precedent, he writes: "A judge, from the lowest to the highest court, wishes to justify his decision by precedent, and by a general principle if at hand or to be found. This is the general practice of all courts, and the decisions of the Permanent Court of International Justice should not be and cannot be an exception to the universal rule . . . notwithstanding the express provision in Art. 59 of the Statute, therefore, the jurisprudence of the Court forms a continuous body of law applicable to the relations of States. It is closely linked with a century of development which preceded the Court's creation, and it constitutes a repository of principles, rules and standards which cannot be ignored in future decisions."

There is undoubtedly matter for debate on the question of the respective advantages and disadvantages of the English and Continental doctrines of judicial precedent in their application to the Permanent Court. Dr. Lauterpacht shows[2] that, while the English doctrine of the binding force of precedent is no part of international law and is expressly vetoed by Art. 59 of the Statute of the Court, no tribunal can with due regard for its own authority habitually neglect its own previous decisions.

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[1] Manley O. Hudson: *The Permanent Court of International Justice.* A Treatise. (New York: Macmillan, 1934.) 731 pp.

[2] H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice.* (London: Longmans, Green & Co.)

The present lack of codification as a means of developing international law inevitably results in much of that development being left to the Permanent Court, and in their decisions, almost invariably accepted by the litigating States, acquiring the value of precedents. Since its inception the Permanent Court has been the dominating factor in international law and appears likely to continue so in the immediate future. Professor Hudson's Reports are therefore of the greatest value and importance to all concerned with international law and with the decisions of the Permanent Court. He is to be warmly commended on undertaking this most useful work, the publication of which has been appropriately undertaken by the Carnegie Endowment for International Peace.

J. C. G.

INTERNATIONAL ORGANIZATION.

Dr. Hedges' addition "to the already voluminous literature on international organization"[1] is distinguished by sound judgment, common sense and a commendable brevity in the use of the learned material at his command. The three main parts of the book deal respectively with the development of international organization, with the organization of peace (containing an excellent short treatment of methods for settling disputes) and with international co-operation. It is difficult to see how the work could have been better done in the space available. M. Mantoux in his Foreword congratulates the author on his abstention from dogmatism, particularly in the field of international law: his pages on this subject are, however, perhaps for this reason, amongst the most interesting in the book, and are likely to send students farther afield.

Alfred Zimmern.

CLASSICS OF INTERNATIONAL LAW.[2]

Fate, unkind to Grotius, smiled upon Pufendorf. The son of a country pastor in Saxony, he lived to be the favourite of kings and princes. His published works brought him fame and honour and a posthumous reputation second only to that of Grotius. The *De Jure Naturae et Gentium*, first published in 1672, when the author was forty years old, remained in vogue for something less than a hundred years. In the second half of the eighteenth century Pufendorf was superseded by Wolf and Vattel, and his fame languished. It became the fashion, in imitation of Leibnitz, to refer to him in terms of depreciation and ridicule. As early as 1716 D'Aguesseau addressing his son said: "Parmi les Modernes les Sçavants du Nord estiment beaucoup le gros Traité de Puffendorf *De Jure naturali, gentium et Civili.* Je souhaite que vous ayez plus de courage que je n'en ai eu, mon cher Fils. Mais je vous avoue peut-être à ma confusion, que je n'ai jamais pu achever la lecture de cet ouvrage. L'auteur est profond à la vérité, mais il écrit à la mode des péripatéticiens qui obscurcissent souvent ce qu'ils veulent définir par les termes abstraits et des expressions techniques, plus propres à donner la facilité de discourir longtemps sur une matière, qu'à la faire bien entendre."[1]

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[1] *International Organization*. By R. Yorke Hedges, LL.D., with a Foreword by Professor Paul Mantoux. (London: Pitman.) Pp. xx + 212. 10s. 6*d*.

[2] *De Jure Naturae et Gentium Libri Octo*. By Samuel Pufendorf. Vol. I, Photographic Reproduction of the Edition of 1688 with an Introduction by Walter Simons, Former Minister of Foreign Affairs of Germany, Former Chief Justice of the Reichsgericht, President *ad interim* of the German Republic (1925). Vol. II, Translation by C. H. Oldfather, Professor of Ancient History and Languages in the University of Nebraska, and W. A. Oldfather, Professor of the Classics in the University of Illinois. (No. 17 *Classics of International Law*.) (Oxford at the Clarendon Press; London: Humphrey Milford, 1934.) Pp. 66 + 1002; pp. 64 + xiii + 1465. 63*s*. net.

Later writers, while agreeing that Pufendorf is dull, have not allowed that he is deep, and during the nineteenth century students of International Law have known his name, but not his works. Dr. Walter Simons in an Introduction, which is a valuable epitome of Pufendorf's book, suggests that times have changed to his advantage.

"Die heutige zeit steht der rechtsphilosophischen Richtung des 17. und 18. Jahrhunderts weit näher als es das 19. Jahrhundert tat. Die Menscheit wendet sich von der ubertriebenen Verehrung des Historismus und Positivismus, der das letzte Jahrhundert charakterisierte, mit Entschiedenheit wieder den absoluten werten zu, ohne die eine sichere Führung des Lebens der Einzelnen und der Staaten nicht möglich ist. Selbst in den Rechtsgebieten des 'Common Law' [the printer has turned this into 'Corn Law,' for which the translator substitutes 'case law'], den Angelsächsischen Ländern, macht sich ein Umschwung von dem unbedingten Kultus der Präjudizien zu einer mehr systematischen, rechtsphilosophischen Begründung der Rechtswissenschaft bemerkbar. Dadurch gewinnt auch die Lehre Pufendorfs heute ein erhöhtes Interesse. Werkwürdig ist, dass manche seiner Ausführungen an Werke moderner katholischer Schriftsteller erinnern, obwohl er grossen Wert darauf legt, als Bekenner der reinen lutherischen Lehre angesehen zu werden, und die Berufung auf die Ansichten katholischer Schriftsteller vermeidet."

Readers, therefore, who have a taste for jurisprudential philosophy or philosophical jurisprudence may be grateful to the Carnegie Institution for including Pufendorf's work in their *Classics of International Law.*

Though Pufendorf is commonly regarded as one of the founders of this science, his work is in no sense a treatise on International Law. It has been aptly described as a *Corpus Juris Naturalis*. The amount of space specifically devoted to International Law is relatively small. It should be easy, one might suppose, to estimate the nature of his contribution to this branch of legal science. It is strange, therefore, to find M. Avril, who contributed the chapters on Pufendorf to *Les Fondateurs du Droit international*[2] (and to whom I am indebted for the quotation from

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[1] D'Aguesseau, *Œuvres*, t. i, p. 295 (*Instructions sur les Etudes propres à former un Magistrat*). (Paris, 1787.)

[2] Paris (1904).

D'Aguesseau) and Dr. Walter Simons expressing contrary views on this matter. While M. Avril writes : " Je ne veux analyser que les idées se rapportant à l'étude du Droit international. Ce sont précisément les plus originals et les plus réfléchies de l'auteur," Dr. Simons says : " Mit dem sechsten Kapitel [des achten Buchs] beginnt der ausschlieslich völkerrechtliche Teil des Werkes. Er zeigt verhältnismässig am wenigsten Originalität des Denkens, schliesst sich vielmehr in weitem Umfang den Ergebnissen an, die der grosse Meister des Völkerrechts, Grotius, bei seinen Untersuchungen dieser Materie gewonnen hat." I should be inclined to think that this judgment is nearer to the truth.

The translation, which is the work of two professors of the Classics, seems, on the whole, to be correct and to have an adequate grasp of legal technology. But the reviewer has too much respect for his eyesight to embark upon a detailed comparison of text and translation. Work of this character would command more confidence if it were known to have been submitted for revision to a competent civilian. The English version of Dr. Simons's Introduction is very faulty. The translator has made many blunders in rendering legal terms of art ; nor (may be added) does *Meerengen* mean isthmuses.

R. W. L.

THE CLASSICS OF INTERNATIONAL LAW.

THESE two volumes [1] are a part of the series of the classics of international law edited by J. B. Scott, and most munificently produced by the Carnegie Endowment for International Peace. The first volume contains a photographic reproduction of the 1764 edition of Wolff's magnum opus, together with an introduction in German by Dr. Nippold ; the second volume contains a translation, both of the work and the introduction, by Professor Drake of the University of Michigan. The work of Wolff was worthy of reproduction, because, of all the writers on international law of the eighteenth century, he stands out as the most philosophical. He laid down principles that are still valid. He foresaw the " Society of Nations," the Federation of States of which the beginning has been made in the League. As Judge Nippold put it : " He created the postulates of all further progress, and in all senses of the word became the spiritual leader of his age." He wrote those words in 1917, and added a postscript after the Covenant of the League was included in the Peace Treaties : " Wolff has proved himself a prophet whose thoughts to-day, two hundred years later, are beginning to be common to all."

As with most of the founders of the science of international law, the starting-point for Wolff was theology. But he was also master of the physics and mathematics of his age. And it is interesting that he was elected a Fellow of the Royal Society of London and of the Academy of

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[1] *Jus Gentium Methodo Scientifica Pertractatum.* By Christian Wolff. Two vols. : vol. i, Text of 1764 ; vol. ii, Translation, pp. 411 and 565. (London : Humphrey Milford, Oxford University Press.) 36*s*. net.

Science in Paris. In the title-page of his Treatise he describes himself as: "State Councillor of the King of the Swedes, principal Professor of Mathematics and Philosophy in the University of Marburg, honorary Professor of the Academy of St. Petersburg . . . member of the Royal Society of England and of Russia." That list is a remarkable indication of the catholicity of his interests, his knowledge and his reputation. His treatise on international law was written towards the end of his life, and was the embodiment, as it were, of all his philosophy. In his earlier years he published a large number of books in German; then, feeling that he should address a larger public, he wrote his later works in Latin. He prefaced the treatise which is here translated by a work in eight volumes on the Law of Nature. This treatise is designed as a conclusion to the other. Wolff is not easy reading, either in Latin or in the translation; and the whole book is a deduction of theory without concern for the practice of nations. The translation both of his text and of the introduction is accurate enough; and, for that reason, is not less laboured than the original. But we must be grateful for having the work available in such complete form.

N. B.

ITALIAN CIVIL LAW.

THIS[1] is a skeleton of Italian civil law, apparently used by the author in connexion with his lectures in that subject at the Royal Superior Institute of Economic and Commercial Sciences at Turin. Englishmen do not usually feel the need of a symmetrical outline of law; and most Englishmen, we fancy, will be inclined to dismiss it, somewhat contemptuously, as a cram-book. But "that much abused word, cram," it has been said, "is often only a synonym for accurate and well-arranged knowledge"; and if Signor Ricca-Barberis, having constructed his skeleton on paper, can in his lectures make the dry bones live, then the law students of the Turin Institute are truly fortunate in their teacher. He is quite frank, too about his own heresies: his exclusion, for example, of *indebito arricchimento* and *abuso del diritto* from his scheme in the interests of symmetry is anything but orthodox. But, then, he puts the student on his guard about this in a brief but interesting preface.

S. V. FG.

We have also to acknowledge:[2]

Germany's Equality of Rights as Legal Problem. By Viktor Bruns. (Berlin: Carl Heymanns Verlag.) Pp. 32. RM. 1.

A History of the Levant Company. By Alfred C. Wood. (London: Humphrey Milford, Oxford University Press.) Pp. xviii + 263. 12*s*. 6*d*. net.

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[1] *Istituzioni di Diritto Privato esposte per tavole sinottiche.* By Mario Ricca-Barberis. (Torino, 1934.) Pp. 242. L.25.

[2] Mention here does not preclude a review later.

The Cause of War and the Conditions of Peace. By Quincy Wright. (London: Longmans, Green & Co., Ltd.) Pp. xi + 148. 5*s.* net.

Annual Survey of English Law, 1934. (London School of Economics.) (London: Sweet & Maxwell, Ltd.) Pp. xxviii + 308. 10*s.* 6*d.* net.

A Bibliography of Civil Service and Personnel Administration. By Miss Sarah Greer. (London: McGraw-Hill Publishing Co., Ltd.) Pp. x + 143. 12*s.* net.

Training Public Employees in Great Britain. By Harvey Walker. (London: McGraw-Hill Publishing Co., Ltd.) Pp. xi + 213. 15*s.* net.

Annual Digest of Public International Law Cases, 1929–30. Ed. by H. Lauterpacht. (London: Longmans, Green & Co., Ltd.) Pp. xxxvi + 534. 42*s.* net.

Anson's Law and Custom of the Constitution. Vol. II. The Crown. 4th Edition by Berriedale Keith. (London: Humphrey Milford, Oxford University Press.) Pp. xxxi + 325 and xv + 414. 30*s.* net.

Diplomatic Correspondence of the United States. Inter-American Affairs, 1831–60. Vol. VI. Selected and arranged by William R. Manning. (Washington: Carnegie Endowment for International Peace. Pp. xxxii + 735. $5.

Oppenheim's International Law. Vol. II. *Disputes, War and Neutrality.* 5th Edition by H. Lauterpacht. (London: Longmans, Green & Co., Ltd.) Pp. lii + 782. 45*s.* net.

The Sino-Japanese Controversy and the League of Nations. By Westel W. Willoughby. (London: Humphrey Milford, Oxford University Press; Baltimore: The Johns Hopkins Press.) Pp. xxv + 733. 22*s.* 6*d.* net.

La Vie Juridique des Peuples. No. 6. Suisse. (Paris: Librairie Delagrave.) Pp. xiii + 435. Frs. 36.

Les Actes de Gouvernement. By Paul Duez. (Paris: Librairie Recueil Sirey.) Pp. 215.

Le Droit des Femmes et les Nouvelles Constitutions. By Suzanne Grinberg. (Paris: Librairie Recueil Sirey.) Pp. 46.

La Question Cypriote : aux points de vue historique et de droit international. By Michel Dendias. (Paris: Librairie Recueil Sirey.) Pp. xxvii + 241.

Anerkennung ausländischer Ehescheidungsurteile im internationalen Privat- und Prozessrecht. By Dr. Rita Rosenberger. (Wärzburg: Verlag Konrad Triltsch.) Pp. xvii + 86. RM. 3.

Die Ultra-Vires-Lehre im englischen Privatrecht. By Dr. Clemens Schlink. (Berlin: Walter de Gruyther & Co.) Pp. xvi + 183. RM. 6.

Das Problem des Völkerrechtlichen Angriffs. By Wilhelm G. Hertz. (Leiden: A. W. Sijthoff's Uitgeversmij N.V.) Pp. 183. Hfl. 3.60.

Beiträge zum Problem der internationalen Doppelbesteuerung. By Dr. Wilhelm Wengler. (Berlin: Walter de Gruyther & Co.) Pp. xiv + 198.

Das Revolutionsproblem in der deutschen staatswissenschaftlichen Literatur, insbesondere des 19 Jahrhunderts. By Dr. Alexander Gurwitsch. (Berlin: Verlag Dr. Emil Ebering.) Pp. 215. RM. 8.40.

Die Doppelte Gerichtsbarkeit in den Vereinigten Staaten von Nord Amerika. By Dr. Friedrich B. Sieveking. (Hamburg: Hans Christian Verlag.) Pp. 124. RM. 2.85.

Kritik der Notstandslehre. By Dr. jur. habil. Reinhart Maurach. (Berlin: Carl Heymanns Verlag.) Pp. viii + 154. RM. 8.

Der Grundsatz des wohlerworbenen Rechts im internationalen Privatrecht Geschichte und Kritik. By Dr. jur. habil. Horst Müller. (Hamburg: Friederichsen, de Gruyter & Co.) Pp. 348. RM. 12.

L'Assistenza Giudiziaria nei Rapporti Internazionali. By Ernesto Cucinotta. (Milan: Dott. A. Giuffre.) Pp. xvi + 320.

I Conflitti Interregionale di Leggi nel Diritto Internazionale. By Dott. Antonio Scrimali. (Palermo: F. Ciuni Editore.) Pp. 398.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Gold Coast Review; Headway; Hindustan Review; Instituto Ibero-Americano de Derecho Comparado publications; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Rapports Judiciaires de Quebec; Revista de Ciencia Juridicas y Sociales; Revista de Derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences; Wisconsin Law Review; Zeitschrift für Ostrecht.